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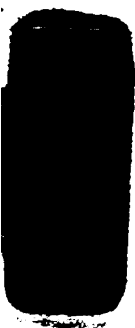
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**AMERICAN JURIST**

**AND**

**LAW MAGAZINE**

**FROM APRIL 1838 TO JANUARY 1843.**



# **AMERICAN JURIST**

**AND**

## **LAW MAGAZINE**

**FROM APRIL 1838 TO JANUARY 1843:**

**DURING WHICH PERIOD IT WAS CONDUCTED AND PRINCIPALLY EDITED**

**By LUTHER S. CUSHING.**

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**IN TEN VOLUMES.**

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**VOL. IV.**

**Containing Numbers 43 and 44, for October 1839, and January 1840,  
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# AMERICAN JURIST.

NO. XLIII.

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OCTOBER, 1839.

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## ART. I.—LAW OF CONTRACTS.

### No. 5.—*Of the Consideration.*

AN oversight in our last number is readily acknowledged. It was there suggested that assumpsit had never been maintained in Westminster Hall for misperformance of a gratuitous undertaking, but that all the English decisions on this point were made in actions *ex delicto*. It is found, however, that in 1824, the exchequer chamber decided <sup>1</sup> that as-

<sup>1</sup> Whitehead v. Greetham, M'Clelland & Younge, 205 ; 2 Bing. 464 ; 10 Moore, 183. See also Doorman v. Jenkins, 2 Adolph. & Ellis, 256, where a bailee of money was held liable, in assumpsit, for gross negligence in losing it. This seems to have been regarded as a case of misperformance. It was also stated in our last number, that perhaps Wheatly v. Low (Cro. Jac. 668, Palmer, 231) was the only case in which the action of assumpsit had been sustained for non-performance of the terms of a gratuitous bailment, as such. The court of exchequer, in 1836, felt "pressed by the authority of Wheatly v. Low" and thought "it advisable that the rolls should be searched for the purpose of ascertaining in what manner the consideration and the promise are there laid." As the case was compromised, no such search was made. 2 Meeson & Welsby, 143, Shillibeer v. Glyn. It is perhaps worthy of notice that C. J. Ley, according to Palmer's report of Wheatly v. Low, said that *not guilty* was the plea that should have been made in that case.

sumpsit was maintainable for such cause, and that the delivery of money to be safely invested was a sufficient consideration to charge the receiver as for a breach of contract in not investing it safely. The counsel for the defendant (the present lord chief justice of the common pleas) asserted, in his argument, that all the preceding decisions were made in actions on the case.

#### EXECUTED CONSIDERATION.

There is, perhaps, no point of law, which intelligent students more universally regard as arbitrary and unreasonable, as they find it announced in the books, than the matter of executed consideration. It is asserted, as if it were elementary doctrine, that if the consideration be wholly executed and past, and do not go along with the contract, it will not support a promise, unless the consideration were executed at the request of the promisor: *Aliter*, of a consideration executed in part only.<sup>1</sup> The reason of this rule is seldom set forth with the proper clearness. The suggestion in a note, in our last number, as to the positions laid down by certain writers in reference to pleading and the forms of action, as if they were the abstract doctrines of the law, is specially applicable to this point. And in the outset it may be well to say that the doctrine before us is merely a rule of pleading, and is susceptible of an exposition which will show that it is reasonable, and that it is also a necessary part of the system of enforcing and defending the rights of parties in the action of assumpsit.

In the case of *Hunt v. Bate*<sup>2</sup> the declaration averred that the defendant promised to save the plaintiff harmless, in consideration that he *had* become bail for the defendant's

<sup>1</sup> Dr. & Stud. 181; 1 Rol. Ab. 11; Bac. Ab. Assumpsit, D; 7 Cow. 360; 1 Taylor, 63; 1 McCord, 515; 1 Pow. Con. 348, *et seq.*; 1 Lil. Ab. 299; 1 Dane's Ab. 119; 4 Vern. 144; 1 Selw. N. P. 48, 1st ed.

<sup>2</sup> Dyer, 272, a.

servant. Judgment was arrested. So where the declaration alleged that the defendant promised to pay the plaintiff five pounds, in consideration that the plaintiff *had* delivered to him twenty sheep.<sup>1</sup> So of a promise by a lessor to give a new lease, in consideration that the lessee *had* incurred expense in defending his title under the old lease.<sup>2</sup> So of a promise to loan the plaintiff ten pounds upon request, in consideration that the plaintiff *had* formerly loaned the same sum to the defendant.<sup>3</sup> So of a promise to repay sixty pounds, in consideration that the plaintiff *had* before paid that sum to the defendant's creditor in satisfaction of the debt.<sup>4</sup> So of promises in consideration that the plaintiff *had* sold and delivered goods, lent money, &c. to the defendant, or *had* done work for him, or *had* sold and conveyed a farm to him.<sup>5</sup> All these were cases within the first part of the rule above mentioned—that is, cases where the consideration was wholly executed and past, and not at the request of the promisor.

If, however, the consideration be executed at the promisor's request, it is sufficient to support a promise. This was suggested as the remedy which would have cured the defect in the case of *Hunt v. Bate*, above cited from *Dyer*, 272, a ; and in the next page of that book an anonymous case is reported, in which a promise to pay £20 "in consideration that the plaintiff, at the *special instance* of the defendant, had taken to wife the cousin of the defendant," was enforced at law, "although the marriage was executed and past before the undertaking and promise." These cases

<sup>1</sup> Cro. Eliz. 442, *Jeremy v. Goochman*.

<sup>2</sup> Moore, 220, *Moore v. Williams*.

<sup>3</sup> Moore, 643, *Dogget v. Vowell*.

<sup>4</sup> Cro. Eliz. 741, *Barker v. Halifax*.

<sup>5</sup> *Oliverson v. Wood*, 3 Lev. 366 ; *Hayes v. Warren*, 2 Barnardiston B. R. 141 ; 8. C. 2 Stra. 933 ; 7 Johns. 87, *Comstock v. Smith* ; 6 Wend. 649, *Parker v. Crane* ; 1 Wend. 492, *Leland v. Douglass* ; S. P. Balcom v. Craggin, 5 Pick. 295 ; *Stanhop's case*, Clayt. 65.



were determined in 10 Eliz. Seventeen years afterwards (27 Eliz.) the question arose in the very case of becoming bail for a third person at the defendant's request, and was decided for the plaintiff.<sup>1</sup> "The request" said Periam, J. "is a great matter in the case."<sup>2</sup> Afterwards, it was settled by numerous decisions, that in all other cases, where the consideration was executed and past at the time of the promise,—if it were executed (that is, if the service, &c. were rendered) at the promisor's request, it was sufficient to support the promise and maintain the action.<sup>3</sup>

There seems not to be much of good sense or of equity, in the abstract doctrine that an executed consideration will not support a promise. Wilmot, J.<sup>4</sup> says "many of the old cases are strange and absurd; so also are some of the modern ones, particularly that of *Hayes v. Warren*." He also says that the doctrine "has been melting down into common sense, of late times." The case of *Hayes v. Warren* is questioned also by Mr. Lawes.<sup>5</sup> Rush, president of the court of common pleas in Pennsylvania, says, that according to "the liberal ideas that actuate modern courts," though the service has been rendered prior to the promise, yet if the party be under either a legal or moral obligation to pay, the promise will bind him.<sup>6</sup> It will be found, however, upon an examination of the history of the doctrine in question, that there has been no relaxation of it;

<sup>1</sup> Godb. 31, Sydenham & Worlington's case; S. C. Cro. Eliz. 42; 2 Leon. 224.

<sup>2</sup> Godb. 32.

<sup>3</sup> Style, 465, *Hardres v. Prowd*; 1 Brownl. 7, *Lampleigh v. Braithwaite*; S. C. Moore, 866; Hob. 105; Cro. Jac. 18, *Boden v. Thian*; S. C. Yelv. 40; Cro. Car. 408, *Townsend v. Hunt*. The case of *Sandhill v. Jenny*, cited in Dyer, 272, b. in *marg.* cannot be regarded as law: and the case in *Ow.* 144, and Cro. Eliz. 885, is either misreported or was wrongly decided. Probably the decision was as Moore reports it (Moore 643), and as it has been already cited from him.

<sup>4</sup> 3 Bur. 1671, 1672.

<sup>5</sup> Lawes Pl. in Assump. 435.

<sup>6</sup> 2 Binn. 592, *Greeves v. McAllister*.

and that the case of *Hayes v. Warren* stands on precisely the same grounds as the other cases, and could not have been decided differently without violating long established principles.<sup>1</sup> "Modern courts" would allow the plaintiff in such a case, to amend his declaration. Further than this, their "liberal ideas" would not extend.<sup>2</sup>

It is one of the elementary principles of pleading, in the action of *assumpsit*, that the declaration must state a valid consideration for the promise which the plaintiff seeks to enforce.

In most of the cases that have been cited, the plaintiff failed by reason of his bad pleading. His real case was meritorious and legal, but the cause stated in his declaration was without consideration. In *Hunt v. Bate*, there was in fact no consideration which the law regards. The plaintiff's becoming bail was a transaction *inter alios*, neither beneficial to the defendant nor inconvenient to the plaintiff, *at the instance of the defendant*. According to a rule, noticed in our fourth number, there was, therefore, nothing to support the promise. Indeed, the court, that decided the case, say

<sup>1</sup> This was an action for work and labor done by the plaintiff for the defendant, in consideration whereof the plaintiff promised to pay—there being no averment that the work was done at the plaintiff's request. The defendant was defaulted, and judgment was arrested, on his motion.

<sup>2</sup> "It is scarcely possible to make any secondary rule of law, but it shall fail in some particular case; whence springeth this often-used assertion—*non est regula quin fallat*. And therefore the ordainers and interpreters of law respect rather those things which may often happen, and not every particular circumstance, for the which, though they would, they should not be able, by any positive law, to make provision."—"Wherefore, as all men endued with the right use of reason, and conversant in the knowledge of any law, must of necessity confess, every law doth stand upon permanent rules, as of iron not to be bent or broken upon this or that occasion, or to be infringed upon this or that occurrence; for else there need no court of law, but all should be one with the court of conscience, and have their proceedings framed according to the arbitrary conceit of the judge." *Doddridge's English Lawyer*, A. D. 1631.

"there is *no* consideration wherefore the defendant should be charged for the debt of his servant, for he did never make request," &c. The case was decided, not on the ground of an executed consideration, but of no consideration.

The other cases that have been cited rest, in truth, on the same ground. Some of the earliest of them were decided on the authority of *Hunt v. Bate*, and on the notion, not at all explained, of an executed consideration. But if such consideration were bad in itself, how could it be made good by a previous request?

Cases mentioned in our last number have settled the doctrine that a voluntary courtesy, or mere gratuitous service, is not a consideration that will support an implied promise. The law is the same, in many instances at least, in case of an express promise.<sup>1</sup>

The true and the only satisfactory reason for regarding as void a promise on an executed consideration, when there was no previous request, is this—that it does not appear that there was any legal consideration for such promise. The consideration may have been a gratuitous service or voluntary courtesy. In declaring on a promise made upon such consideration, no valid consideration is stated, unless a previous request is alleged. But if the consideration is executed at the request of the promisor, the promise "is coupled to the consideration by the request," and is not merely a naked promise. The previous request is a sufficient consideration for the subsequent promise; the plaintiff has incurred a loss, damage, or inconvenience, at the instance of the defendant—which, as has been before seen, is (with reference to the rules of pleading) one of the requisites of a consideration for a promise.<sup>2</sup> The settled forms

<sup>1</sup> 3 Pick. 207; 7 Connect. 51; 4 Munf. 473.

<sup>2</sup> Lawes Pl. in Assump. 63; 1 Saund. 264, note; Hob. 106; 1 Blackford, 247.

of pleading in assumpsit require, for this reason, that a declaration on a promise made upon a consideration wholly executed and past should allege that the debt was incurred, the service rendered, &c. at the defendant's request. A count for money had and received, and a count on an *in-simul computassent*, are exceptions to this rule.<sup>1</sup>

The ground of this doctrine of executed consideration, as stated in Bacon's Abridgment, and elsewhere, is this—"it is not reasonable that one man should do another a kindness, and then charge him with a recompense: This would be obliging him whether he would or not, and bringing him under an obligation without his concurrence."<sup>2</sup> This is a very satisfactory reason for not charging a party on an implied promise, in most cases of this kind; but it does not seem, at first sight, to reach the case of an express promise recognizing the services and their value to the promisor—nor those cases where there is a legal and moral duty antecedent and paramount to the will of the party, from which the law raises a promise even against his protestations. The form of declaring is, however, the same, whether an express or an implied promise is relied on; and it will presently be seen, that a previous request may be *implied* or inferred from circumstances, as well as a subsequent promise. There are cases in which an express request is necessary to support the action, as there are cases in which an express promise must be shown. But as the summary forms of declaring in general assumpsit are the same in all cases, and as it does not necessarily appear, on the face of the declaration, that a promise on an executed and past consideration is legally binding, without a previous

<sup>1</sup> 1 Chit. Pl. (2d ed.) 297; 2 Chit. Pl. 5; Lawes Pl. in Assump. 435; 1 Saund. 264, *note*.

<sup>2</sup> Bac. Ab. Assumpsit, D.; 1 Saund. 264, *note*; 1 Caines, 585; 1 Leigh's Nisi Prius, 86.

request, such declarations are held to be ill.<sup>1</sup> In declaring on a contract upon an executory consideration, it is not necessary to allege it to have been at the defendant's request; because, in all cases where a request is necessary, it is necessarily implied: As if A promise B to pay him \$1000 if he will build a house, the promise implies that A requested B to build it—*et sic de similibus*.<sup>2</sup>

In *Hicks v. Burhans*<sup>3</sup> it is said, that "if a promise founded on a past consideration be not laid to have been on request, a request may be implied." And in *Comstock v. Smith*,<sup>4</sup> it is said that it does not seem requisite, in every case of executed consideration, to lay a request in the declaration. The same remark is repeated in *Doty v. Wilson*.<sup>5</sup> These, however, are *obiter dicta*, and are questioned in the notes to the second editions of 1 Caines 585, and 7 Johns. 88.

It is laid down expressly by serjeant Williams<sup>6</sup> that a request must be averred. It is strongly implied in what is said by Kent, J., 1 Caines, 585, and is regarded as essential by the authors of the able note in 3 Bos. & Pul. 249, and in 1 Morgan's Vade Mecum, 107, 122. Besides, the forms of pleading (which Buller, J., says<sup>7</sup> are evidence of what the law is) contain this allegation.<sup>8</sup>

In *Church v. Church*, cited in T. Ray. 260, and in *Franklin v. Bradell*, Hut. 84, and perhaps one or two other ancient cases, this allegation was not deemed indispensable after verdict; and it was intimated by the court, in *Hayes v.*

<sup>1</sup> See *Stokes v. Lewis*, 1 D. & E. 20; *Naish v. Tatlock*, 2 H. B. 322; 3 Woodeson, 142, 143.

<sup>2</sup> Lawes Pl. in Assump. 63. See the different forms of declaring, in general and special assumpsit, stated by Mr. Lawes in his Pl. in Assump. 1. 2.

<sup>3</sup> 10 Johns. 243.

<sup>4</sup> 7 Johns. 88.

<sup>5</sup> 14 Johns. 382.

<sup>6</sup> 1 Saund. 264, note. See also 1 Greenleaf, 126; 6 Wend. 649.

<sup>7</sup> 3 D. & E. 161.

<sup>8</sup> The first seventy pages of 2 Chitty's Pleading.

Warren,<sup>1</sup> which has already been referred to, that a verdict might have cured the defect in that case.<sup>2</sup> It is however to be noticed, that in several of the earliest cases on this subject, the objection was raised after verdict, and was sustained.<sup>3</sup> There are cases in which it has been held that if the plaintiff declare that the defendant, *being indebted* to the plaintiff (for goods delivered, &c.) *in consideration thereof* promised, &c., it is sufficient, without alleging a request of the defendant; on the ground that the "being indebted" implies that the consideration was executed at the request of the defendant; or that the consideration is a continuing one, and not wholly executed and past.<sup>4</sup> Mr. Lawes<sup>5</sup> thinks that the present summary form of declaring, in most of the counts in indebitatus assumpsit, necessarily implies a request, or an assent to the debt contracted; and that as the old cases were decided before this form was adopted, they did not warrant the decision in *Hayes v. Warren* where the declaration was in the modern form. Still he asserts, on the preceding page, that "it is usual and proper in indebitatus assumpsit to state the cause of the debt as having taken place at the special instance and request of the defendant." And in page 62, the same author asserts the necessity of alleging a request, and gives the reason already stated, viz.: otherwise "*non constat* that it was not done of the plaintiff's own accord, and without the defendant's order or desire, in which case it is no good consideration for a subsequent promise."

The law is probably thus—the allegation of "being indebted" is substantially good, without stating a request,

<sup>1</sup> 2 Stra. 933.

<sup>2</sup> In Pennsylvania, a verdict is held to cure this defect. 9 S. & R. 434, *Stoever v. Stoever*.

<sup>3</sup> *Dyer*, 272; *Cro. Eliz.* 442. 741.

<sup>4</sup> 1 Rol. Rep. 413, *Hodge v. Vavisor*; S. C. 3 Bulst. 222; *Lawes Pl. in Assump.* 438. 443; 1 Rol. Ab. 12, pl. 16, *Barton v. Shirley*.

<sup>5</sup> *Pl. in Assump.* 436.

but not technically and formally correct—there being no debt, by legal intendment, unless for something done by request. In a count for goods sold and delivered, or for money lent, it might perhaps be said that a sale or a loan necessarily imports a request; but the precedents all contain an averment of it.<sup>1</sup> In a count on an *insimul computassent*, the promise is alleged to be in consideration of being found in arrear and indebted upon an accounting with the plaintiff of and concerning moneys before owing and due, and in arrear and unpaid.<sup>2</sup> “The stating of an account is regarded as a consideration for the promise, and is in the nature of a new promise.”<sup>3</sup> There is a practice in Massachusetts, and probably in some of the adjoining states, of declaring, in indebitatus assumpsit, that the defendant, being indebted, &c. according to the account annexed to the writ, in consideration thereof, promised, &c.—no request being alleged.<sup>4</sup> This, though sanctioned by long use, is a slovenly practice.<sup>5</sup>

Though, for the reasons already given, a request must be averred, in declaring on a promise upon an executed consideration, or some terms used which are of equivalent legal import; yet in many cases it is not necessary to prove an express request. A request is frequently implied from the circumstances of the transaction. Where the party

<sup>1</sup> Stephen on Pl. 47; 1 Lil. Ent. 29, 30. See 2 D. & E. 30, Emery v. Fell, opinion of Buller J. In Barton v. Shirley, 1 Rol. Ab. 12, pl. 16, a count for money lent and accommodated was supported, though no request was alleged. The form was—“being indebted,” &c. 2 Chit. Pl. 16.

<sup>2</sup> 2 Chit. Pl. 44.

<sup>3</sup> By Spencer, J., 1 Johns. 36. See also 1 D. & E. 42, by Buller, J.; 7 Greenleaf, 121; 2 Stark. Ev. 123; Regula Placitandi, 11, 12. See 2 Conn. 415, 416.

<sup>4</sup> 13 Mass. Rep. 284, Rider v. Robbins.

<sup>5</sup> In Sheffield v. Rise, Moore, 367, “in consideration that the plaintiff had submitted to the arbitration of J. S. the defendant *ad tunc et ibidem assumpsit*” was held a good declaration, on demurrer, as the words must be understood to allege a promise at the time of the submission.

derives a benefit from the consideration, it is often tantamount to a request; and a jury will infer one, for the purpose of enforcing a meritorious legal claim.<sup>1</sup> The same doctrine is applied in cases of mere legal duty which the law enforces through the medium of a suit on an alleged promise, without regard to the will of the party—as for the support of a wife wrongfully discarded by a husband, &c. A previous request (as well as a promise) is here inferred by a jury, directly contrary to the fact, on the ground of legal obligation only. The case of *Jenkins v. Tucker*<sup>2</sup> was decided on this ground, where the expenses of the funeral of the defendant's wife, incurred and paid by her father, were recovered of the defendant, who was out of the country at the time of her death.<sup>3</sup> So of the case of *Tugwell v. Heyman*,<sup>4</sup> where executors, who neglected to give orders for the funeral of the testator, were held liable to the person who furnished it.

In a majority of the cases where the plaintiff has failed for want of an averment of previous request, the jury, under the direction of the court, would have inferred a request, from the circumstances of the case, if it had been alleged in the declaration. In some of these cases, they found a verdict for the plaintiff, though no request was alleged.

The whole amount, then, of this doctrine of executed consideration is simply this—that one man cannot make another his debtor without his assent, expressly given or implied by law; and that the forms of pleading are such, that the mere statement of a promise on such a consideration *does not show*, that there is any consideration for it except a voluntary courtesy, which will not uphold an assumpsit.

<sup>1</sup> 1 Saund. 264, note; Chit. Con. 15; 14 Johns. 192, *Outfield v. Waring*; 4 East, 83; 3 Bos. & Pul. 612.

<sup>2</sup> 1 H. B. 90.

<sup>3</sup> See also *Dyer*, 272. b. in *marg.* note b.

<sup>4</sup> 3 Campb. 298. See also 10 Pick. 156.



If a consideration be "executed in part only," it will support a promise. Modern writers call this a "continuing consideration." The case of *Cotton v. Wescott*<sup>1</sup> may be taken to illustrate this doctrine. The plaintiff declared that the defendant married a maid who sojourned in the plaintiff's house, and "did then desire the plaintiff that his wife might still continue in the house a year longer, to which the plaintiff agreed; and afterwards, about the middle of the year, the defendant promised, in consideration that the plaintiff would suffer the wife to continue in the house for the whole of the year, he would pay the plaintiff for the whole year, as well the past as the future." This, as alleged in pleading, is a clear case of an executory consideration. And if it had been an executed one, a previous request is alleged. But if it had been alleged that the defendant, in consideration that the plaintiff had permitted the wife to be in his house for six months, promised to pay therefor and for her subsequent residence there for six subsequent months, at the defendant's request, a good consideration would have appeared, viz.: one executed in part only, though that part was not at the request of the defendant.

In *Pearle v. Unger*<sup>2</sup> the plaintiff declared that the defendant, in consideration that the plaintiff had occupied his land, and paid him rent while he occupied it, promised to save the plaintiff harmless during the term, as well for the years past as to come, and alleged a distress of his cattle before the promise. The defendant was held liable, on the ground that as the defendant had paid and was to pay rent, there was a good consideration for the promise. Anderson, J. says<sup>3</sup> that although where the contract is determined, a

<sup>1</sup> 3 Bulst. 187; 1 Rol. Rep. 381. S. C. See also 3 Woodeson, 144; Clayt. 43, Merriwether's case; 1 Lil. Ab. 114.

<sup>2</sup> Cro. Eliz. 94; 1 Leon. 102. S. C. See also 2 Bulst. 73, *Jones v. Clarke*.

<sup>3</sup> Godb. 31.

promise is void, yet it is "otherwise upon a consideration of marriage, for that is always a present consideration, and always a consideration, because the party is always married." Walmsley, J. says<sup>1</sup> "an assumpsit, in consideration that you had married my daughter, to give unto you £40 was good; for the affection and consideration always continue." These are *dicta* only; but the case of *Marsh v. Kavenford*<sup>2</sup> was adjudged on the same principle.

There are cases, upon consideration executed in part only, that are not very intelligible. The doctrine seems sometimes to have been misapplied, or at least greatly strained, for the purpose of maintaining an apparently meritorious action. It is not possible to ascertain, in every instance, what form of declaration was adopted. In some cases, the consideration seems to have been stated as wholly executed, but it further appeared, from the facts alleged, or from necessary inference from them, that the whole benefit of the contract had not been enjoyed by the promisor, which circumstance was regarded as sufficient to take the case out of the rule applied to considerations wholly executed and past. In the summary form of declaring in *indebitatus assumpsit*, in use at this day, such cases cannot arise. The record would not furnish the court with the means of ascertaining that the consideration was executed in part only. A special declaration would be necessary, in order to enforce a promise in such case.<sup>3</sup>

<sup>1</sup> Cro. Eliz. 741.

<sup>2</sup> Cro. Eliz. 59; 2 Leon. 111. S. C. See also 3 Salk. 96.

<sup>3</sup> See cases on this point, collected in Com. Dig. Assumpsit, B. 12; Bac. Ab. Assumpsit, D.; 1 Pow. Con. 349, *et seq.* Chit. Con. 16; Cro. Eliz. 133, *Warcop v. Morse*. It may be worthy of notice, that chief baron Comyns, in his Digest, (*ubi sup.*), has placed under the head of "Consideration executed in part," not only the class of cases above noticed, but also those in which the consideration is alleged to be that the promisor had accounted and was found in arrear. The cases in which the consideration is the "being indebted," would seem, on the same principle, to fall into this class; and accordingly

As the distinction between executed and executory considerations is a matter of pleading, and respects only the modes of averment in a declaration, the rule seems to be this, viz. : if the consideration appears on the declaration to be a continuing consideration, it is substantially good, though a request of the party be not alleged ; but if the consideration appears to be wholly executed and past (that is, if there is no continuing consideration, nor averment that the party is at present indebted) an averment of a request is indispensable ; and if the consideration is executory, request and performance must both be alleged.

This, however, more properly belongs to the subject of pleading, and has been noticed here only for the purpose of explaining the doctrine of executed consideration.

As there will probably be no occasion to advert hereafter to the fictions adopted in setting forth the plaintiff's claim in declarations in the action of assumpsit, it may not be amiss to present, in this place, a succinct view of those fictions, and of the reasons on which they are founded.

The usual action on a simple contract, in old times, was debt. The declaration, in that action, averred in substance that the defendant owed the plaintiff and thereupon an action had accrued, &c. No promise was alleged ; for no promise was necessary. But the defendant was allowed to wage his law. To avoid this wager of law, a new form of action was devised, to wit, the action of assumpsit, in which a promise of the defendant was alleged, and was indispensable. A declaration, which did not aver such

Mr. Comyn, and Mr. Chitty, junior, place the case of *Hodge v. Vavisor* (above cited) under this head, 1 Com. Con. 25 ; Chit. Con. 17. It is not easy, perhaps, to understand the reason of chief baron Comyns's arrangement, unless by "in part" he meant cases where the original consideration was executed, but there is a still continuing consideration for a promise, and so not wholly executed, in the sense generally attached to the words *functus officio*. In the present state of the law, this arrangement seems not to be accurate.

promise, was insufficient even after verdict ; and the law is the same at this day. The promise declared on is always taken to be express. In pleading, there is no such thing as an implied promise. But as no new rule of evidence was required, in order to support the new action of assumpsit—it being necessary only to prove a debt, as was necessary when the action was debt—the fictitious doctrine of an implied promise was introduced ; and for the sake of legal conformity, it was held, when the defendant's legal liability was proved, that the law presumed that he had promised to do what the law made him liable to do.

As no gratuitous promise binds the promisor—a consideration being necessary to the validity of a simple contract—and as a promise on an executed consideration does not show that it was not gratuitous, unless it be averred to have been executed at the request of the promisor ; it has always been held necessary to allege such request in the declaration. But here again no new rule of evidence was required in order to support the action. The defendant's request was therefore held to be implied in those cases where he was legally liable to the plaintiff as he would have been in the action of debt.

A single example will fully illustrate these two fictions. A husband is bound by law to support his wife ; and if he wrongfully discard her, any person may furnish support to her, and recover pay therefor of the husband. In the action of debt, there would be no necessity to allege a promise, in such case. But the husband might wage his law, and defraud the plaintiff. In the action of assumpsit, the furnishing of the supplies must be alleged to have been by the plaintiff at the husband's request, and a promise of the husband to pay must also be alleged. But proof of the actual facts supports both these allegations. The husband,

<sup>1</sup> Gilbert on Debt, 364 ; Gould Pl. 58, 59 ; Comyn on Con. part iv, chap. iii.

being in law liable to pay, is held to have (impliedly) made both the request and the promise. In this instance, the legal maxim is well supported—*in fictione juris subsistit æquitas*.

In other instances, the request only, or the promise only, is implied by law, according to the exigence.

#### CONSIDERATION ARISING FROM THIRD PERSONS.

It is often said that the consideration of a promise must move from the plaintiff, or he cannot enforce the promise by action.<sup>1</sup> Thus, where one H. was indebted to the plaintiff, and the defendant promised to pay H.'s debt to the plaintiff, if H. would assign his interest in a house to the defendant, and H. assigned (or offered to assign—which was tantamount in law) yet it was held that the plaintiff could not recover, on this promise, because he was a stranger to the consideration.<sup>2</sup> It had previously been decided, on similar ground, that the plaintiff could not recover, in a case where one P. was indebted to the plaintiff and also to the defendant, and a stranger was indebted to P. and the defendant promised to pay P.'s debt to the plaintiff if P. would allow the defendant to sue the stranger—although the defendant did sue the stranger for P. and recovered his debt.<sup>3</sup> In each of these cases, the decision must have been the same, on the principle adopted by the court, even if the promise had been made to the plaintiff himself. Notwithstanding such promise, he would have been as much a stranger to the consideration, as he was when the promise was made to a third person. It is said in Buller's Nisi Prius, 134, that these cases would in these days (perhaps) receive a different determination. Indeed a case prior to both of these had been decided differ-

<sup>1</sup> This point was not noticed by Mr. Chitty, Jun., in the first edition of his Treatise on Contracts.

<sup>2</sup> 1 Stra. 592, Crow v. Rogers.

<sup>3</sup> Bourne v. Mason, 1 Vent. 6; S. C. 2 Keb. 457, 527; S. P. stated in Delabar v. Gold, 1 Keb. 44. 121.

ently.<sup>1</sup> The case of *Crow v. Rogers* was, however, recently recognized by the king's bench as sound law, and a similar decision was made upon the authority of that case.<sup>2</sup> In *Bourne v. Mason*, the counsel for the plaintiff cited an earlier case, where A promised B, if he would give his daughter in marriage to A's son, A would settle lands upon the son; after the marriage, the son brought an action against A on this promise, and it was sustained; also a case in which, upon a promise to a physician that if he did a certain cure, the defendant would give him a certain sum, and also another sum to his daughter, and the daughter maintained an action on this promise: To both which cases the court agreed—"for in the one, the party that brought the action did the meritorious act; and in the other, the nearness of the relation gives the daughter the benefit of the consideration performed by her father."

It is now well settled, as a general rule, that in cases of simple contracts, if one person makes a promise to another, for the benefit of a third, the third may maintain an action upon it, though the consideration does not move from him. There are ancient cases to this point, as well as modern. Thus in *Sadler v. Paine*, in 24 Eliz.<sup>3</sup> where the plaintiff had conveyed land to the defendant, and the defendant afterwards, on a valid consideration, promised one D. (a kinswoman of the plaintiff, whom the plaintiff employed to negotiate the contract) to reconvey the land to the plaintiff; it was held that the action was rightly brought by the plaintiff for the breach of this promise. The promise, however, was regarded by barons Shute and Manwood, as made to the plaintiff, on the ground, in part at least, that D. was his agent previously authorized. So in *Legat's case*, in 3 Car. I,<sup>4</sup> an

<sup>1</sup> Style, 296, *Starkey v. Mill*.

<sup>2</sup> *Price v. Eaton*, 4 Barn. & Adolph. 433. See also *Morrison v. Beckey*, 6 Watts, 349.

<sup>3</sup> Savile, 23.

<sup>4</sup> Latch, 206.

action was sustained on a promise made, as was alleged in the count, "to the plaintiff's attorney, on behalf of the plaintiff." These cases were both decided, probably, on the ground, that the promisee was the agent of the plaintiff. It is the proper course, however, to aver that the promise was made to the plaintiff. Such is the legal effect of a promise made for the plaintiff's benefit; and a declaration would not probably be now supported, unless the promise were alleged to have been made to the plaintiff. In *Bell v. Chaplain*,<sup>1</sup> it is said, that where a promise is made to a father for the benefit of his son, the declaration must be upon the promise to the father, though the son bring the action. It is not readily perceived how a party can recover in *assumpsit*, unless he allege a promise to himself. And *Eyre, C. J.* says,<sup>2</sup> "in the case of a promise to A for the benefit of B, and an action brought by B, the promise must be laid as being made to B; and the promise actually made to A may be given in evidence to support the declaration." Such is the practice, and such, doubtless, is the law.<sup>3</sup>

Mr. Hammond<sup>4</sup> seems to suppose that the only ground, on which the decisions upon this point can stand, is that the promise is made to A as the agent of B, and thus the consideration moves from B; and that the action should therefore be brought in B's name; and that all the cases, which do not conform to this view of the doctrine, are at variance with the original principle of law, that the party giving the consideration is the only person privy to a simple contract; or, in other words, that the legal interest in a simple contract resides only with the party from whom the consideration moves. This notion of agency is refined and artificial, and is adverted to by the courts in very few of

<sup>1</sup> Hardr. 321.

<sup>2</sup> 1 Bos. & Pul. 102.

<sup>3</sup> See *Lawes Pl. in Assump.* 93, 97; *Arnold v. Lyman*, 17 Mass. Rep. 400.

<sup>4</sup> *Parties to Actions*, 7, *et seq.* See also 1 *Neville & Perry*, 26, *Lilley v. Hays*.

the cases hereafter to be cited. And though there are *dicta* that an action can be brought only by him for whose benefit the promise was made,<sup>1</sup> and though *Levet v. Hawes*<sup>2</sup> and *Pine and Norish*,<sup>3</sup> and some other cases, were so determined, yet the law is well settled, that, in general, either party may sue on such promise.

That the party to be benefited by the promise may bring an action on it, has been decided in numerous cases.<sup>4</sup> In *Dutton v. Poole*<sup>5</sup>—which was greatly debated, and about which lord Mansfield said it was matter of surprise<sup>6</sup> how a doubt could have arisen—where a remainder-man promised the tenant, that if he would leave the wood standing on the land, he would give his daughter £1000, it was held that the daughter might maintain an action on this promise. In some of the cases that have been cited, the consideration actually moved from the plaintiff, though the promise was made, in form, to a third person. How the consideration moved from the daughter, in the case of *Dutton v. Poole*, or how the father was her agent, is not very apparent. In the case of a promise, made to the assignee of a chose in action, by the debtor, the consideration, as usually understood, moves from the original promisee.

That either party may maintain an action, in the cases under discussion, seems to be as well settled, as that it may be maintained by the party for whose benefit the promise is made.<sup>7</sup> Where a party contracts, as mere agent, and avows

<sup>1</sup> Per Hutton, J. *Hetl.* 176.

<sup>2</sup> *Cro. Eliz.* 619, 652.

<sup>3</sup> Cited in *T. Jon.* 103.

<sup>4</sup> *Yelv.* 1, *Rippon v. Norton*; *Doug.* 142, *Martyn v. Hind*; *Cowp.* 437; 17 *Mass.* 579, *Hall v. Marston*; 1 *Bos. & Pul.* 101, note *b.*; 1 *Brownl.* 82; *Moore*, 667; 3 *Pick.* 92, *Cabot v. Haskins*; 8 *Johns.* 58; 13 *Johns.* 497; *Yelv.* 25, and cases cited in a note. 1 *Hall*, 260.

<sup>5</sup> 1 *Vent.* 318. 332; 1 *Freem.* 471; 2 *Lev.* 210; *T. Ray.* 302; *T. Jon.* 102.

<sup>6</sup> *Cowp.* 443; *Doug.* 146.

<sup>7</sup> *Hammond on Parties*, 9; *Hardr.* 321, *Bell v. Chaplain*; *Aleyn*, 1, *Bafeild*



his agency at the time, he cannot maintain an action on the contract, for it is not his contract but his principal's. This is the general rule, though there are exceptions to it in certain mercantile transactions.<sup>1</sup>

On a sealed instrument, *inter partes*, the action must be brought by the obligee, covenantee, &c. though the contract be to pay, &c. to a third person.<sup>2</sup> The court of chancery formerly compelled the obligee, &c. to sue at law, if necessary, for the benefit of the party interested, and at his promotion;<sup>3</sup> but, at this day, the party interested may himself sue in chancery, on such contract.<sup>4</sup>

#### CONSIDERATION WHICH THE PARTY CANNOT PERFORM.

To support a contract, the consideration must be such as the party can in fact, and by law, perform. "Every person, who, in consideration of some advantage, either to himself or another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact but in law."<sup>5</sup> Therefore, where the defendant promised to repair the plaintiff's barge, in consideration that the plaintiff would discharge him of £20 due to a third person, a judgment for the plaintiff was reversed by the court of king's bench, because the plaintiff could not discharge a debt due to another.<sup>6</sup> So where a friend of a bankrupt promised to pay his assignees all such sums as the bankrupt had received

*v. Collard*; 1 Chit. Pl. 5, and cases there cited; 17 Mass. 404, by Parker, C. J. 3 Barn. & Ald. 281, by Bayley, J. See also W. Jon. 415, *Rowe v. Newbury*.

<sup>1</sup> See *Hammond on Parties*, 32, 58, *et seq.*; 5 M. & S. 383, *Bickerton v. Burrell*; 1 Meriv. 155.

<sup>2</sup> 2 Inst. 673, *Scudamore v. Vandenstene*; 3 Bos. & Pul. 149, note; Yelv. 177, note; 2 Day, 560, *Sanford v. Sanford*; 12 Pick. 554, *Sanders v. Filley*.

<sup>3</sup> Cary, 20.

<sup>4</sup> 4 Pick. 523, *Ward v. Lewis*.

<sup>5</sup> By lord Kenyon, 3 D. & E. 22.

<sup>6</sup> 2 Lev. 161, *Harvy v. Gibbons*. 3 Salk. 97. See also 2 Barn. & Cres. 474, *Bates v. Cort*.

on a certain partnership account, and had not accounted for, in consideration of their engagement to forbear and desist from taking an examination before the commissioners concerning such sums, and that the commissioners would also forbear and desist from such examination, a judgment for the assignees was reversed, on the ground, in part, that they could not prevent the commissioners from proceeding in the examination.<sup>1</sup> So when a promise of forbearance by an assignee of a chose in action was held not to be a good consideration for a promise to pay the debt to him, unless he was empowered by letter of attorney to sue and release, it was on the ground that it was not legally in the assignee's power to forbear—the debt, and of course the power of collecting it, belonging to the assignor.

If the consideration be, at the time of the contract, physically and clearly impossible, as to go to Rome in a day, &c. it will not support a promise. In such cases, as in those just mentioned of legal impossibility, there is no consideration.<sup>2</sup>

When a party promises that a third person shall do an act, the promise will be on a valid consideration, if the thing to be done by such person be not physically or legally impossible. Legal impossibility, in this instance, includes unlawful acts, as well as those which are beyond the legal ability of the party who is to do them. The law intends that it is in the power of the promisor to cause the third person to do the act stipulated for; or that when he made the promise, he had the contingency in view, and assumed the risk, of being able or unable to effect the object.<sup>3</sup> The

<sup>1</sup> 3 D. & E. 17, *Nerot v. Wallace*. The principal ground of decision in this case was that the agreement was unlawful.

<sup>2</sup> See Puffendorf, book iii, ch. 7. § 1, 2, 3, 10; 1 Pow. Con. 160, *et seq.* 178, 179; 3 Chit. Com. Law, 100; Rutherford, book i, chap. 12, § 7. Grebner Philos. Moral. part ii, sect. i, ch. 7, § 2.

<sup>3</sup> 1 Saund. 216, *Doughty v. Neal*, and *note*, 2; 10 Johns. 27, *Mounsey v. Drake*; Chit. Con. 14; Sayer, 185, *Heaketh v. Gray*.

case of *Harvy v. Gibbons*, above cited, would doubtless have been decided for the plaintiff, if the promise had been that the third person should discharge him from the £20 debt. Indeed, this would seem to have been the more rational construction of the promise actually made in that case.

Most of the cases on this point have arisen on specialties; but the principles that have been stated seem equally applicable to simple contracts.

#### CONSIDERATION VOID IN PART.

If one of two considerations of a contract be merely void, and not illegal, the other will support the promise;<sup>1</sup> as a promise in consideration of an assignment of a title to dower, *and* of forbearing to sue an attachment out of chancery upon a decree. Though a title to dower cannot be assigned, yet the forbearance will support the contract. But if one of two considerations be illegal, it vitiates the contract *in toto*;<sup>2</sup> as if part of the consideration of a bill of exchange be spiritous liquors sold contrary to law, though the other part of the consideration be money lent.<sup>3</sup>

#### UNLAWFUL CONSIDERATION.

A consideration must be not only sufficient, but legal. Whenever the consideration or any part of it is unlawful, we have just seen that the whole contract is void.<sup>4</sup> It is not necessary to illustrate this principle here, as it may more properly be done hereafter, in treating of *unlawful contracts*.

<sup>1</sup> Yelv. 56, *Pickard v. Cottels*; Cro. Jac. 128, *Crisp v. Gamel*; Style, 58, 63, *Bruer v. Sowthwell*; Style, 280, *Shann v. Bilby*; 1 Sid. 38, *Best v. Jolly*; 8 Mass. Rep. 51, by Sedgwick, *J. Cro. Eliz. 149. 848. 759*; *Onslow's Nisi Prius*, 145; 1 Lil. Ab. 297.

<sup>2</sup> Cro. Eliz. 199, *Featherston v. Hutchinson*; T. Jon. 24, *Morris v. Chapman*; Cro. Jac. 103, *Bridge v. Cage*; 8 Johns. 253, *Crawford v. Morrell*.

<sup>3</sup> 3 Taunt. 226, *Scott v. Gilmore*.

<sup>4</sup> See cases collected, Com. Dig. *Assumpsit*, F. 7; Chit. Con. 215, *et seq.*

According to Mr. Chitty junior, whose description of a simple contract has so often been cited, the consideration must be sufficient and legal, and the agreement must be "to perform some legal act, or omit to do any thing, the performance whereof is not enjoined by law : " That is—the consideration must be lawful, and the thing to be done or omitted must also be lawful, or the agreement is void. It is not only useless but difficult to illustrate these two points separately, by examples. To every agreement there are in fact two considerations. This is manifest in the cases of mutual promises executory—as in the case, for example, of *Gibbons v. Prewd*, *Hardres*, 102. The plaintiff promised to convey to the defendant all his interest in the estate of a person deceased, before a certain day, and the defendant promised to pay the plaintiff £25, before the same day. The consideration of the plaintiff's promise was the promise of the defendant, and *vice versa*. Had the promise of either been to do an unlawful act, the *contract*, that is, the promise of each would have been void. The same is equally true, though perhaps less obviously so, of all other agreements, whether executory or executed on one side only, or executed on both sides. Thus, where an officer, in consideration of a promise of indemnity, suffers a prisoner in execution to escape, the consideration is executed on his part, and executory on the part of the promisor. Here there is not only the promise of indemnity, as the consideration for the officer's act, but there is the officer's act, either done or agreed to be done, as the consideration for the promise of indemnity. And so of all other contracts; as might be shown by a glance at the pleadings of both parties, if both should sue. Either party to a contract may sue the other for a breach of it; and, in all cases, it is necessary to set forth, in the declaration, the consideration of the contract, as well the terms of it. When, for example, an action is brought on a contract for A's doing one thing in consid-

eration of B's doing another thing—if A sues, he states, in his declaration, the thing to be done by himself, as the consideration of the promise made to him by B. If B sues, he states the thing to be done by himself as the consideration of A's promise to him.

A consideration on one side may be lawful, and unlawful on the other—that is, a promise to do a lawful act may be made on an unlawful consideration; or a promise to do an unlawful act may be made on a lawful consideration. As if A promise to reap B's field, in consideration that B will beat C, or cause him to be beaten—or if B promise to beat C, in consideration that A will reap B's field. In such case, as one or the other party may happen to sue, the consideration, or the promise, will be illegal. So both considerations, or the consideration on both sides, may be unlawful. As if A promise to beat C, in consideration that B will not give evidence against him, if called as a witness. These contracts are equally void, and none of them can be enforced.<sup>1</sup>

Contracts are said to be illegal, either because the consideration of a promise is illegal, or because the promise is illegal. The distinction is without a difference. At least, there is no difference, in effect, between the two. Wherever the illegality lies, the contract cannot be supported in a court of law. And it will be found, it is believed, that the phrase "void for illegal consideration" is usually adopted only in those cases where the party, from whom an illegal consideration moved, sues for the breach of a *promise* which is not in itself illegal: As if an officer sues on a promise of indemnity—in itself an unexceptionable promise—the consideration of which was his permitting an escape—an unlawful act. If the other party sue the officer for not permitting the prisoner to go at large, according to agreement, the language would be that the *contract* was illegal; for the

<sup>1</sup> See 1 Pow. Con. 176.

*consideration* of the contract on the part of the party suing, and from whom it moved, was not illegal.

This difference of language, that is, sometimes saying the *promise* is void for illegal consideration, and sometimes that the *contract* is void because it is illegal, tends to confuse the student, and may leave the impression that the party to a contract, who stipulates for nothing unlawful on his part, may enforce his claim against the other party, though the other party, on whom the illegality rests, cannot enforce the contract against *him*. The law is not so. The whole contract is void—to speak with the most technical precision—whenever the consideration on either side is unlawful; that is—whether that which is the ground of the promise on one part, or the thing which is promised to be done on the other part, is unlawful, all is void, and neither party can derive any assistance from a court of law or of equity to carry it into effect.

It seems therefore that writers make a needless distinction, in saying that *assumpsit* will not lie “for an unlawful thing,” nor “if the consideration be unlawful.” We say this with great distrust of our own views; especially as this distinction was adopted by baron Comyns.<sup>1</sup>

#### FAILURE OF CONSIDERATION.

When the consideration of a contract fails, that is, when what was supposed to be a consideration turns out to be none, the contract may be avoided. If money has been paid, it may be recovered back, where the consideration fails: or if a note, &c. has been made, failure of consideration is a sufficient defence to a suit brought to enforce payment or performance.

When real estate is conveyed by deed, with warranty; and notes are given for the price, it is held by some courts

<sup>1</sup> Com. Dig. *Assumpsit*, F. 4. 7.

that the failure or want of title in the grantor is not a defence to an action on the notes—that the grantee's only remedy is on the covenants in his deed—that the covenants in a deed of conveyance constitute a sufficient consideration for the notes.<sup>1</sup> In other courts, a want or failure of title is held to be a legal defence, in such case.<sup>2</sup> But the failure must be total, in order to sustain such defence.<sup>3</sup>

To avoid circuity of action, courts have of late permitted partial failure of consideration to be a defence *pro tanto* in suits on contracts respecting personal property, work and labor, &c. As in the case of a contract to build a house in a particular manner, and at a specified price, if the work is inferior to that which was agreed on, the defendant may show this fact and reduce the plaintiff's compensation to the actual benefit received by the defendant.<sup>4</sup>

By the common law, neither the want nor the failure of consideration is any defence to an action on a bond, or other sealed instrument.<sup>5</sup> By local usage, however, in some of the states of the union, and by virtue of statutes, in other states, such defence is allowed.<sup>6</sup>

T. M.

<sup>1</sup> 1 Greenleaf, 352, *Lloyd v. Jewell*; 2 Greenleaf, 390, *Howard v. Witham*.

<sup>2</sup> 11 Johns. 50, *Frisbee v. Hoffnagle*. See also 3 Stew. & Port. 92, *Wilson v. Jordan*; 3 Pick. 452, *Knapp v. Lee*.

<sup>3</sup> 2 Wheat. 13, *Greenleaf v. Cook*; 15 Mass. Rep. 171, *Smith v. Sinclair*; 3 Haywood, 109, *Stephenson v. Yandle*. See also 1 Johns. Ch. Rep. 213; 5 Binn. 355.

<sup>4</sup> See 2 Stark. Ev. 97, 280, 640; 3 Stark. Ev. 1768; Chit. Con. 191, 276; 7 Pick. 181.

<sup>5</sup> 2 Mass. Rep. 162; *Cooke*, 499; 1 Devereux, 46; 1 Bailey, 213; 2 Root, 139; 3 J. J. Marsh. 473; 13 Johns. 430; 2 Johns. 177.

<sup>6</sup> 3 Blackford, 131. 502; 2 Bay, 76; 5 Monroe, 273; Addison, 10. 236; 1 Dallas, 17; 11 Wend. 106; 1 Breese, 1. 94. It has heretofore been mentioned, that a court of chancery will not enforce the execution of a sealed contract, if it be purely voluntary. And in the case of *Wright v. Moore*, Tothill, 27, "a voluntary bond of £1000, entered into for no consideration, was cancelled in the presence of the judges."

## ART. II.—INSANITY :—CASE OF PECHOT.

THE increasing attention to the subject of insanity in connexion with crime, has induced us to devote a few of our pages to some account of a case reported in a late number (xxxv) of the *Annales D'Hygiène Publique*. In the course of the judicial investigation which it underwent, some of the most delicate and difficult questions which such cases ever involve came up, and received a careful and enlightened discussion, which makes it peculiarly interesting to those who are desirous of obtaining light on this subject.

Jean Pechot, 58 years old, a farmer and widower, lived with his three young children, and a servant, Anne Lerusard, nearly as old as himself. The latter complained of the odd and peevish temper of her master, but continued to live with him out of regard for the children, whom she treated with the kindness and care of a mother. On the 22d of April, 1836, Pechot had forbidden her going to market at Rennes, but shortly afterwards, observing her go to the stable, he followed her, took from her a basket of eggs, and ordered her to return; she refused, when he struck her on the head, probably with a wooden mallet which was found there among other tools. He immediately fled to a hay-loft, the door of which he barricaded, where he was found by two of his neighbors, in great terror, and constantly exclaiming that "they had sent for the gens d'armes to come and arrest him; that he wanted his domestic to leave the stable; that she refused, and he struck her, he knew not with what, but did not think he struck her very hard." When asked why he struck her, he replied: "I do not know; it was a thought; the devil is so tempting." The woman died shortly after.

On the 29th of April, he underwent his first examination, when he protested that he did not know whether he struck



the woman or not, though it seemed as if he had pushed her with his hand, and that she had fallen over a log that was in the stable. He declared that he was an *innocent* (imbecile); that the good God and the holy virgin had abandoned him and his children; and that he did not conceal himself, but thought that he was at home with his children. He frequently interrupted the examination by deploring the fate of his children, and anxiously inquiring what they were going to do with him; complained of thirst, and several times asked for cider.

Doubts having been raised respecting Pechot's mental condition, Dr. Chambeyron, physician-in-chief of the lunatic hospital at Rennes, and Dr. Brutè, physician of the prison, were requested to examine him, and the following is their report.

"Many times, either together or separately, we visited the prison, for the purpose of ascertaining the mental condition of Jean Pechot, confined on a charge of homicide. Our visits were made unexpectedly, at intervals of several days, and in the presence of the jailer and others employed in the prison.

"We always observed in Pechot some heat in the forehead and dryness of the skin,—very common symptoms of insanity, though far from belonging exclusively to that disease. The appetite, sleep, and other functions, were represented by the keepers as regular. His countenance was always sad, and indicated deep dejection. The examination to which we subjected him at different times appeared to cause him fatigue and annoyance, but never irritation, or even impatience. When questioned concerning his name, age, country, relatives, the act with which he was charged, and the circumstances that preceded, accompanied or followed it, his answers were always slow, never incoherent; sometimes clear and precise, more frequently evasive, such as: 'I don't know, I don't recollect; you know

better than I ; what do you want me to tell you ; what is the use of all these questions ; tell me what you want.' To the same question repeated at the same interview, or some days afterwards, he sometimes replied in a vague manner as will presently appear ; sometimes correctly and clearly, but always like a man destitute of all elasticity, unable, without an effort, to arouse himself from his apathy and his own thoughts, to follow those of the person addressing him. His eye was constantly on the watch ; the slightest noise, the least gesture, instantly attracted his attention, and several times we succeeded in renewing the occasion of repeating a remark. At last, one of us, Dr. Brut , thought he detected an intentional obstinacy in the continual return of the same answer, without any relation to the question addressed to him, as : 'give me some cider ; I want some cider ; I can pay for it.'

"We did not observe, nor learn that any one else had observed, any symptom of mania, or general delirium, with or without fury. We did not recognise any of the physical characters of imbecility, or dementia ; still, it is impossible for us to say, that his understanding is nowise impaired, the trials to which we subjected the accused having necessarily been short, limited to a conversation in which he did not take an active part, and not directed to any one of the most ordinary circumstances of life. Neither did we see any thing, that could authorize us to admit the existence of homicidal, or other monomania. We ought to remark, however, first, that monomaniacs can elude with wonderful sagacity questions that have any reference to the ideas in regard to which they are delirious ; second, that partial delirium is sometimes so limited, that without previous accurate information, we are frequently unable, except accidentally, to discover its object. The force of this remark is weakened in the present case, by the particular circumstance, that Pechot has several times declared that he has

been an imbecile more than forty years ; so that it can scarcely be supposed that he is simulating insanity.

“ From the examination, the results of which we have thus stated, we conclude,

“ 1. That Pechot is at present in a state of morbid melancholy, the most prominent character of which is deep mental dejection ;

“ 2. That under certain circumstances, this dejection might give place to a momentary but excessive irritation ;

“ 3. That the present state of Pechot may be only the result of the physical and moral circumstances in which he has been placed since his arrest ; but that it might be equally the continuation of an analogous state, more or less severe, existing prior to the crime imputed to him, and in regard to which we have not been required to state our opinion.

“ 4. That the assertion of Pechot that he is an imbecile, does not appear sufficient to establish the charge of simulation. Perhaps even, on reflection, it might seem to exclude such a charge. Besides, it is not rare for insane patients to discern the probable consequences of their acts, and endeavor to avoid them by the confession of their diseased condition. It even happens, sometimes, that the impression produced on them by a criminal act restores them to reason.”

On the 26th of July, Pechot underwent a second examination, which, however, elicited but little, if any, additional light on his case. He persisted in all his former statements, and when inquired of respecting his motives for committing the crime, he alleged that the deceased struck him first, after abusing him at a great rate ; that she had frequently robbed him, and shut him up in the hay-loft. He expressed his belief that his affairs were in a very bad state ; that his land was ruined ; that he and his children were doomed to perish, while he felt sick and unable to labor.

Finally, on the 11th of November, he was brought before the court of assizes. His walk was slow and unsteady ; his

eye dull, but without that furtive and unquiet look it formerly had ; his lower lip drooped ; the features were shrunk ; and his skin was of a yellowish brown color, but without any particular odor. At the commencement of the trial, Dr. Chambeyron was called on to testify, when he repeated the facts contained in his report, together with the following additional views.

“ It is evident to me that in the month of June last, Pechot was in a state of mental alienation. It was not mania, that kind of alienation which is characterized by a rapid flow of ideas, an imperative necessity for keeping in motion, and a state of excitement which sometimes amounts to fury ; nor was it dementia, that enfeeblement of the faculties which is sometimes vulgarly called *imbecility* or childishness. Still, although we did not then observe the physical characters of the latter form of insanity, it was imminent, if not already begun, for now the features and attitude present the characters which were wanting then. The present dementia is, to my mind, an indication of the preëxistence of another form of insanity, because it is the common termination of all the varieties of insanity.” Was it monomania, or that delirium which is confined to a single series of ideas ? “ I cannot say that it was, because, in the absence of any kind of information respecting the case, I could not discover the special object of delirium. But certainly, Pechot was in a state of profound melancholy which rarely proceeds in its course, without a fixed idea, true or false. In fact, he seemed so absorbed in his own thoughts, and his faculties so heavily oppressed, that his replies, whether correct or foreign to the matter in question, were made slowly and with an effort, as if he were fatigued by me, and ready to say, ‘ you annoy me.’ Indeed, all his replies might be interpreted by the single expression, ‘ I have something else to do, but to think of what you are saying.’ In this condition of mind and body, I strongly believe that it would

require but little to put a man beside himself. He is jealous, exceedingly irascible, his anger is disproportioned to the cause that provokes it, and a little teasing is sufficient to produce an explosion of fury whose results it would be impossible to foresee. Such a condition, let me repeat, is not dementia, but it undoubtedly leads to it."

The president of the court having inquired of Dr. Chambeyron, if he thought an insane person could commit homicide without being conscious of the act, he replied in the following language: "Certainly not, especially if he were a maniac or monomaniac. The maniac who strikes or kills is so conscious of what he is about, that frequently, he will strive for an instant against the impulse, and sometimes successfully, though most commonly it hurries him on; indeed he may feel himself under restraints, even while in the act of giving the blow. In this respect, he differs from a rational man only in the circumstance, that he rapidly passes from a state of apparent calm, to one of the most violent irritation; and this, too, in consequence of the most futile cause, frequently even of a cause that no one but himself can at all appreciate, or one that is entirely imaginary.

"The homicidal monomaniac is aware of the ferocious instinct which impels him to murder; he deploras his condition in which he may recognise a true disease, and which he tries to combat by his own efforts, or the aid of medicine.

"For a stronger reason, the monomaniac who commits a premeditated murder is conscious of the act. He weighs and compares for a long while the motives that induce him to act or refrain, though indeed he deceives himself with regard to their relative value. He lays his plan, and displays in his reasoning a logic that would be admirable, were not the premises absurd. In the execution of his project, he displays a coolness, an address, a force of attention, truly inconceivable. The crime consummated, he passively

awaits the penalty, or eludes it with a dexterity that the most experienced villain could scarcely equal."

In these three cases, it is not consciousness that is wanting, it is *free will*<sup>1</sup> Pechot must have obeyed a sudden impulse of the kind first mentioned.

The views of Dr. Chambeyron are strongly corroborated by the other testimony, of which we find only the following summary. "Mr. Letourneur, officer of health, has, within two years, been frequently called to Pechot, whom he found in a state of melancholy and depression which he considered to be the commencement of madness. Towards the middle of 1835, Pechot lost his wife, and from that time his mental disorder was rapidly aggravated. He would keep his bed for months together, rising scarcely long enough to have it made up. His disorder got worse also, after the sale of a cow and two barrels of cider, in which business, he imagined, very incorrectly, however, that he had met with a great loss. He declared he was ruined, reduced to beggary, though the house he lived in and the greater part of the land he cultivated belonged to him. He was constantly exclaiming, 'what will become of my children, when the grain that is now in the barn shall have been used! Poor things, I must dispatch them with my axe.' He was unwilling to labor, under the conviction that God had deserted him, that nothing would go well with him, and the seed which had been sown in his fields would no more grow than if sown on the rocks. His brother, sister-in-law, and their domestic, did his work in spite of himself; he trying to prevent them by treating them roughly, and snatching the tools out of

<sup>1</sup> Dr. Chambeyron here adds the following note, explanatory of the different ways in which the insane impulse affects the will, in the three different kinds of insanity :—"1. A sudden impulse not leaving sufficient time for deliberation. 2. An instinctive continued impulse mastering the will, though discerned by the understanding. 3. An impulse equally continued, sometimes distorting the judgment, at others, resulting from a primitive derangement of this faculty."

their hands. He was unwilling to have his servant labor, and sometimes he suspected her of robbing him. From these two causes arose quarrels to which, however, Anne Lerussard paid but little attention. Sometimes he would chase her; she would pretend to go away, and hardly would get out of sight, when he would go seeking her from door to door, entreating her to return, 'for without her, who would take care of him and his children? who would keep them out of misery?' He would request the attendance of priests, and when he saw them coming, would run away, exclaiming, that they were the people who had buried his wife, and were the cause of all his troubles. He would hear it remarked that he was mad—a charge that always irritated him and added to his melancholy. He was continually revolving in his mind plans of suicide, without seeming to have the resolution necessary to put them into execution. One day he begged his neighbors to put him into an oven and keep him there by force. At another time, he tried to borrow a musket; at another, he lowered himself down from the brink of a well, but got up again, either of his own accord, or at the command of some people who saw him. The burden of his speech was, 'this is the day when I must go.' At last, on the 5th of April, 1836, seventeen days before the death of Anne Lerussard, he threw himself into a pond, after having threatened to stone her to death, or drag her into the water. An old man, one of his friends, accidentally passing by, rebuked him for his conduct. He suffered himself to be taken out without resistance, by his brother, who, having been informed by himself of his design, had followed him at a little distance."

Dr. Chambeyron, now being asked by the president, if he persisted in his opinion respecting Pechot's mental condition, took the opportunity to enforce the views he had already expressed, and which were strengthened by the evidence. "Pechot," said he, "is incontestably insane.

You have seen him here attending this trial with a stupid apathy. You have heard him scarcely answering in unintelligible monosyllables, when asked by the president what he had to say to evidence which bore most strongly against him. He seemed to arouse himself only to combat testimony which went to establish the existence and long duration of his mental disorder. Then he reproached the witnesses with saying whatever they pleased. They told the truth. The melancholy which I recognised in June extended back two or three years, during which a sense of despair had weighed down the mental faculties of Pechot. Now they have lost their elasticity, and will no longer rise under the weight. The dementia which I feared is arrived; it runs its course rapidly, and in less than two years, this unfortunate man will have sunk into the last stage of fatuity."

Pechot was acquitted, but he did not seem to understand what was passing around him, and retired with the gendarmes, repeating his old strain; "where are you carrying me? I believe you are going to kill me."

Dr. Chambeyron closes the account of this case, with the following practical reflections, which are entitled to most serious consideration.

"There certainly cannot remain a doubt as to the reality of Pechot's insanity, or its existence previous to the murder he committed, and its uninterrupted continuance from that time to his trial. Having struck the deceased, and left her for dead in the stable, he fled to the barn and barricaded the door, exclaiming that the gendarmes were after him. The next day he shut himself up again. *An insane person, therefore, may appreciate the act he has committed, and foresee its consequences.* On the other hand, Pechot, after having concealed himself, walked out into the village,—a fact which proves, either the weakness of his understanding, or the versatility of his thoughts. The means he took to avoid



the penalty of the crime, are somewhat silly and puerile, for what rational adult would have thought himself beyond the grasp of justice, when behind a door, unless he designed to sell his life as dearly as possible ?

“ In his examinations, Pechot persisted in saying, that he only pushed the woman with his hand ; yet on the day of the act, or the day after, when the son of the deceased pointed to the tools scattered about the stable, and asked him which he used for striking his mother, he replied ; ‘ if I struck her, I only gave her one blow, but I do not recollect with what,—unless it were this,’ pointing to a little wooden mallet he had picked up. Further, Messrs. Toulmouche and Tourneux, charged with the duty of examining the body of the deceased, found, 1, besides a laceration of the integuments of the head, a separation of the whole fronto-parietal suture ; 2, four fissures involving the parietal bone, one which extended across the temporal and down to the base of the cranium ; 3, several traumatic sanguineous effusions ; 4, considerable depression of the brain under the parietal fracture ; 5, an inflammatory softening of the middle cerebral lobe. They conclude that these lesions were produced by a weapon that would break and bruise without cutting. Such injuries exclude, at least, to a certain degree, the idea of a simple fall, however rough the object with which the head might have come in contact. If, therefore, we admit that Pechot struck the deceased with a mallet, it must equally be admitted, that *an insane person may adopt a system of defence, and persist therein.*<sup>1</sup>

“ It was suspected that Pechot was simulating, but so far

<sup>1</sup> The reader must bear in mind, that the reasoning which leads to the general conclusion here marked by italics, as well as the other similarly marked in the preceding paragraph, is based upon the fact of Pechot's insanity, which is supposed to be proved by other considerations. Of course they are designed for application in other cases, where the facts indicated in these conclusions might, in the absence of other means of information, be adduced as proofs of sanity, being considered as compatible with the idea of insanity.

was he from this, that previous to Anne Lerussard's death, he was grieved and irritated by being called mad. Since then, before the examining judges (*juges instructeurs*) he always eluded the direct avowal of his madness. If he did not labor, it was because he was sick ; if he did not want his fields sown, it was because they were exhausted, and he could get no manure ; if his neighbors testified as to these numerous aberrations, he accused them of saying what they pleased, &c. Thus he presents also a character common to almost all the insane, that of not acknowledging the existence of their disorder, even when they are aware of it themselves."

Notwithstanding the length to which this article has already extended, we cannot forego the opportunity to press upon the attention of our readers some of the important points which this case presents. It ought to convince us, how little calculated to further the ends of justice is the testimony of medical men, in cases of this kind, as generally obtained in this country and Great Britain. If a physician, who was selected on account of his eminence in the particular department of his art that embraces mental disorders, for the purpose of ascertaining the mental condition of a criminal, was unable, after repeated interviews, to discover his insanity, though it actually existed, what confidence can we place in the opinions of those, who have no particular acquaintance with insanity, or perhaps, know less of it than of any other disease, and have had only the most limited means of ascertaining the mental condition of the individual in question ? In France, if a rational suspicion be raised that the accused is insane, his trial is delayed, and physicians who are distinguished for their knowledge of insanity are directed by the judicial authorities to examine his case, and report thereon at a subsequent session of the court. In this country and in England, if the friends or counsel of the accused would rest his defence on the plea of insanity, they

are obliged to rely on the testimony of medical witnesses, whose only knowledge of him has been obtained in one or two casual interviews in the prison ; or, it may be, that without any previous knowledge at all, they are placed upon the witnesses' stand, and required to state, whether, from the testimony they have heard, they are led to believe the accused to be sane or insane. The evil does not rest here. This testimony, instead of being received as the result of an impartial and scientific investigation of a case for the purposes of justice alone, as medical testimony in such cases ever should be, is coolly regarded as part of the evidence "for the defence," to be offset by some of an opposite tenor, trumped up, as best can be, by the government counsel. Is there nothing wrong in all this ? Is it not a mockery of justice, a setting at nought of the common claims of humanity ?

There is another point presented in the management of the above case, which we recommend to the special consideration of our legislators and jurists. No sooner is the insanity of the accused suspected, than the matter is referred to the investigation of those whose studies and habits render them peculiarly fitted to decide it. The jury are not left to be puzzled and confounded by the conflicting opinions of irresponsible men, who may talk of what they know little about, and are more bent on glorifying themselves, or on obtaining a triumph over a professional brother, than advancing the ends of truth and justice. The court too is content to abide by the results of a scientific investigation, modestly declining to enlighten the jury with refined speculations beyond their reach, and to make the issue of the case depend on its notions of the nature and effect of insanity. It seems to have been enough for it to know that the accused was insane, without minutely calculating the extent of his knowledge of right and wrong, or laying down any other metaphysical test of criminal responsibility.

The deliberation, with which the proceedings were con-

ducted in the above case, presents a striking contrast to the indecent haste with which they have been too often hurried in Great Britain. More than six months elapsed between the arrest of Pechot and his acquittal, during which the court instituted suitable measures for determining the exact condition of his mind. Where, in the records of the Old Bailey, shall we find a similar instance of humane and enlightened delay? Bellingham, who shot Mr. Percival in the lobby of the house of commons, was tried, condemned, and executed, within eight days of the commission of the fatal act; and though his counsel raised strong suspicions of insanity, which it needed only the testimony of his friends and acquaintances, who lived at a distance, to confirm, yet the opportunity to send for them was sternly refused by the court, as if it were a covert attempt to defeat the ends of justice. Had Pechot been tried immediately after committing the offence, or even after the report of the medical commission, he, too, would probably have suffered as a felon, instead of being consigned to the hospital as a patient. What further arguments are needed to convince us, that when insanity is pleaded in defence, ample time and opportunity should be afforded, for ascertaining, by suitable inquiries, whether the accused is really sane or not? Whatever the result may be, we cannot see what harm can possibly arise from delay.

I. R.

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### ART. III.—THEORY OF THE RIGHTS OF AUTHORS.

[The following dissertation constitutes Part Third of a Treatise (in French) on the Rights of Authors, in Literature, Sciences, and the Fine Arts, the first volume of which has recently been published at Paris, by Augustin-Charles Renouard, author of a treatise published a few years since on Patents for new inventions. It considers the abstract question of the nature of the rights of authors, independently of all legislation on the subject. Two theories have been started as the basis of the positive law relating to copy

right. One of these theories attributes to an author a right of property in his thoughts, and demands the same protection for this property, which the positive laws accord to the proprietor of an article of merchandise. The other considers the composition and publication of a book as a service (voluntary, indeed, but not the less meritorious,) rendered by the author to the public, which entitles him to an adequate remuneration. On the first of these theories is founded the claim of a perpetual copy-right,—the favorite project of some recent writers; on the other, the system of an exclusive privilege to print and sell for a limited period, which is the basis of the laws of all or nearly all the states of the civilized world, on the subject of copy-right. Mr. Renouard, in opposition to almost all the theoretical writers, adopts the latter system, and explains and defends the grounds of his opinion, in a very able and conclusive manner. His arguments, it seems to us, are unanswerable. This discussion is very remarkable in one respect; it leads by reasoning and argument to the same theoretical results, which have been already practically adopted in the existing laws; and, thus, unlike most theoretical speculations, establishes an existing institution upon the firm basis of abstract and immutable principle. The subject of remunerating authors for their services to the public, or, in other words, the law of copy-right, seems, at this moment, to be attracting legislative attention in every part of the civilized world; and, though the question of theory is hardly an open one in this country, since the constitution of the United States gives its sanction to the system of exclusive privilege for a limited period only; yet the subject is not without its interest here, and will probably be much discussed even on theoretical grounds, by the next or some succeeding congress, in reference to extending the privilege of copy-right to English authors, under the new international copy-right law of Great Britain. Under these circumstances, the following theoretical exposition of the principle, upon which the general system of copy-right is founded, will be likely to prove an acceptable contribution to the somewhat scanty knowledge existing among us on this important and really difficult subject. In the course of this dissertation, Mr. Renouard takes occasion to refer to the opinion of Kant, in regard to the rights of authors; and, in another part of his work, he gives an analysis of the doctrines advanced by that author. As every thing which the great German metaphysician has written is worthy of attention; and as his ideas on the matter in question have had no trifling influence, both in the legislation of the German States, and in the formation of the speculative opinions of the German authors; the analysis of his system, inserted in the first part of Mr. Renouard's work, has been translated and annexed to the Theory of the Rights of Authors. In making the following translation, the French word *éditeur*, which does not answer to our word *editor*, but corresponds more nearly to what we mean by a *publisher*, has been rendered by the latter word. In English, we have no word except *pirate*, to designate one who publishes a book without the permission of the author or proprietor;

and as that word is seldom used in that sense, the word *counterfeiter* has been adopted as a more proper translation of the word *contrefacteur*, by which the French designate an unauthorized publisher.

This dissertation was first read as a memoir before the Academy of Moral and Political Sciences, at Paris, in January, 1837; it was subsequently published in the *Review of Legislation and Jurisprudence*, conducted by Mr. Wolowski; and was then inserted, with some changes and many additions, and a division into paragraphs, in the first volume of Mr. Renouard's work on the rights of authors, from which it is now translated.]

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IN the two preceding parts, I have collected together all the facts, ancient as well as modern, which it has been possible for me to obtain, concerning the rights of authors, without troubling myself as to the consequences to be drawn from such or such of the numerous materials, which I have placed before the eyes of my readers.

Impartiality is not indifference. It was proper, that I should hold myself exempt from every systematic preoccupation, so long as my task was merely that of an exact narrator and a faithful compiler; but now it is our business to draw conclusions; and we should have lost the time we have spent in an exposition of arguments and facts, if so many illustrations had given rise to nothing but doubt in our minds, and, if, unable to choose between them, we did not find ourselves led to the free adoption of a system. For the sake of clearness, I shall divide this dissertation into as many paragraphs as it contains principal propositions.

## I.

*Authors have a right to profit by the produce of their works.*

Natural equity and history agree in putting this proposition beyond dispute. It has always been considered, that the author of a work has a right to be recompensed for his labors. In the period anterior to the invention of printing, this right, too self-evident not to be from thenceforward

explicitly acknowledged, did not exist under the form of an exclusive right; as no one denied the possessor of a manuscript or copy the faculty of reading it, learning it by heart, or reciting it, so it was never dreamed of to interdict the taking of copies, to be bought and sold like all other movable objects. At this epoch, authors sold copies of their works, but the sale was not confined to them; and it was necessary to seek otherwise than in this pitiful way the remuneration to which they were entitled. It was not until after the discovery of the prompt and easy mode of reproducing a great number of copies, by means of the press, that the idea of an exclusive right arose, and it began to be believed that an author might find an indemnification for his labor and a payment for his services in the sale of his works. This right, in the first instance, took the form of a privilege, which at that time prevailed in regard to all industrial fabrications, as well as in the exercise of all the professions; and, which, originally protective, became more and more oppressive, as the improvement of the social state rendered it of less utility. But the system of privileges was complex; and those of authors were inextricably mixed up with the privileges of booksellers, of printers, and of dramatists. We have seen, in the first part of this treatise, what has been the progress of the claims of authors; how, at first unknown and misunderstood, they came to light when literature attained power; how they grew with the influence of the press; and how they finally gained a place in modern legal systems, in all of which they are now the objects of attention and regard.

We may and we ought to discuss at length the nature and the extent of the rights of authors. But to deny that they have a right to derive a profit from their labors would be to deny the existence of light. We shall not stop to demonstrate a truth so manifest.

## II.

*Society acquires, by the publication of a work, a right to preserve the use of it.*

A work before it is published belongs only to the author ; it is his spoken or written meditation, his thought, his intellectual being ; it is himself ; the author is not bound to account for it to any one, and is the absolute master to modify or destroy it. The fruit which he then draws from it is the well-being of study, the enjoyment of labor and of the exercise of his faculties ; it is that pleasure of creation which is produced by the birth of ideas.

By publication, the author ceases to remain alone with his thought, and his work enters into all the understandings to which he communicates the expression of it. This is an incontestable fact. Does there result, from this fact, a right in favor of society ?

It may be demanded, whether an author, who has communicated his ideas by publication, and, in return, has received influence, honor, and perhaps profit from such communication, can, after having obtained these advantages, break the association into which he has caused the public to enter, and, at his pleasure, withdraw the share furnished by himself. Will it not be admitted, that if the public has gained the knowledge of the work, the author, on his part, has gained a public ? Will it be denied, that the most original writer is the work of his own age and of former ages, as much at least as of his own proper genius ; that the general domain has furnished him with the elements of the ideas which he has elaborated ; that in restoring them to the civilization to which he is indebted for them, he acquits himself of a duty towards humanity, and pays to his cotemporaries and to his descendants a debt of gratitude, with which he is charged in favor of his cotemporaries and his ancestors ?



These considerations, weighty as they are, are not sufficient to bind the author himself otherwise than by a moral obligation, or to give rise to a formal right to interdict him from delaying or suppressing, during his lifetime, his intellectual communications with the public.

But when the author has ceased to exist, it does not belong to any one whatsoever to will that his work shall perish, or to place any obstacles in the way of the propagation to which he has delivered it. To have communicated his conceptions to the public, is to have clearly manifested an intention to give duration and life to them; but, it is publicity alone that assures the life of a work, clothes thought with a body which is immortal, and prevents it from being destroyed with the corporeal organs of him who conceived it. The assignees of the author, who can have no rights but from him, would put themselves in revolt against his will, if they should injure the circulation of his work. It is in vain for the author himself to express a desire, that after his decease the contract consummated between him and the public should remain unexecuted; the ideas, which, in his lifetime, he introduced amongst those of the public, the public detains by an indestructible act, and possesses by an irrevocable donation, or, to speak more properly, by an alienation, the price or the penalty of which, received in part during the life of authors, will for ever identify itself with their memory; the public has an express right to preserve these ideas within its domain.

### III.

*A law concerning this matter cannot be good, but upon the double condition, that it neither sacrifices the right of authors to the public, nor the right of the public to that of authors.*

This proposition is a necessary consequence of those already stated. Since the two rights exist, to destroy the

one in order to give force to the other, would be to sanction an usurpation, either upon the private or the public domain.

This conciliation of the two rights and interests, so far from having been neglected in practical legislation, appears, on the contrary, to be the principal idea, which has determined almost all the laws concerning this matter.

This result, to which we have arrived by experience and good sense, is not sufficient to explain the theory; and our legislation, consequently, prudent and just as it is, has been incessantly attacked and called in question even in its very foundations. This cannot fail to be the case, so long as the principles of our law remain enveloped in the same obscurity. It is only by the adoption of a strong and clear theory, and by the destruction of the prejudices which prevail in this matter, that the discrepancies of opinion will have an end. In order to do this, it is not enough to say, that there are two rights to be conciliated; it is necessary to go further, and to become intimately acquainted with the nature of these rights, the conciliation of which is the problem to be resolved by a good law.

#### IV.

*The two systems in question are those of a perpetual property and of a temporary right.*

By the first proposition, I have set aside every system, which would tend to a negation of the right of authors. It is not necessary, at present, to examine how this right shall be exercised; is it perpetual or is it temporary,—such is the fundamental question which we must first decide; it will be time, afterwards, to consider the variable and secondary questions concerning the form to be given to this right, its mode, its conditions, and its duration.

The partisans in favor of the perpetuity of this right are very numerous. Their system is easily described; it is that

of property, with all its juridical characters, transmissibility, perpetuity, inviolability. The greater number of writers have embraced this opinion; we have seen it explicitly taught by d'Héricourt, Diderot, Linguet, Voltaire, and the advocate-general Séguier; and it has been advanced by a hundred others. The expression *literary property* has entered into the language, and the adoption of these words, which have prevailed in use, indicates the popularity of the opinion which they express. This opinion has finally prevailed to such a degree, that the compilers of the laws, limiting the exercise of the rights of authors to a specified period, have considered it a duty to commence by declaring, that, of all kinds of property, this is the most sacred, the most legitimate, the most impregnable.

This theory has been applied by positive legislation in France, in the regulations of 1777, and in the law of March 18, 1806, concerning designs for manufactures. In England, the jurisprudence has declared that a perpetual property existed in virtue of the common law, before it was restrained by legislative acts. The perpetual property existed in Holland from 1796 to 1811, and from 1814 to 1817.

The system of a temporary right has enjoyed but little favor among the writers; but, on the other hand, it has greatly prevailed in legislation. It is the general right of all nations; it is that of France, in all her laws, ancient and modern, with the exception of the two above mentioned. It is upon this basis, also, that all the modern laws relative to patents for inventions are founded.

If the question were to be decided by authority, I do not hesitate to say, that the universal practice of enlightened nations ought to be of much greater weight than the agreement of the theorists, even if they were unanimous.

It is a singularity worthy of remark, that a practice prevails, without exception, which attacks the received ideas,

which is at variance with the established language, and which shocks the favorite thesis adopted and defended by almost all the writers. There certainly must be, on one side or the other, a prejudice to be rooted up, a dominant error to be destroyed.

.. The theory of a temporary right is not, like that of a literary property, readily expressed in a single word; it embraces complex ideas; it demands exposition and development. Already, in my treatise on patents for inventions, I have attempted a demonstration which I am now going to resume and complete, by endeavoring to refute or obviate the principal objections, to which it has appeared to me to have given rise. At this period, I was not acquainted with the dissertation of Kant, on this subject. I do not adopt all the developments or all the consequences of that dissertation; and I agree, that, proposing especially to found and to define the right of publishers, he has not explicitly resolved the question which now occupies our attention. But he has at least established it as a principle, that a book is nothing more than the use of the powers and faculties of the author, or an instrument by the aid of which he addresses himself in language to the public. I hope to demonstrate afterwards, that consequences flow from this fundamental principle, which are irreconcilable with the thesis of a perpetual property.

It has frequently happened to me, in the discussion of this question, to meet with partisans of the right of property who were disposed to hold it very cheap; and, who, provided one consented not to deny the right, were ready to abandon all the consequences of it, and to restrain its effects to those of a property purely temporary. This seems to have been the case also in all the legislative discussions on this subject. That expedients of this kind might be resorted to, in the practical management of affairs, for the purpose of cutting short or evading a discussion, is conceivable; but when we

are called upon to decide a philosophical problem, we must go to our task with more resolution. The pretended solution, which consists in acknowledging the property only to convert it immediately into a right purely temporary, is a mere subterfuge. I shall hereafter demonstrate, that the essential principles of property are opposed to such an adjustment. It is because the discussion of fundamental principles has been eluded, that the questions remain confused; that the laws, drawn up without method and unity, lend themselves to all forms of argument; that the jurisprudence floats without a compass. Investigations of this kind are not idle. The study of legislation would be incomplete, if we should content ourselves with copying the texts which it might bring together, or even with determining the results which it might be useful for it to obtain; and something will be wanting to the satisfaction of the understanding, as well as to the logical certainty of the reasoning, if we neglect to go back to principles, and afterwards to follow them out in their results.

## V.

### *The reproduction of works of mind is not an object of property.*

In order to ascertain whether there is such a thing as literary property, or, on the contrary, whether authors do not derive their right to receive a price for their labors from a different title from that of proprietors, it is indispensable, in the first place, to consider the nature and characteristics of property in general.

It is undertaking a formidable analysis, to attempt to show clearly the grounds upon which the great right of property, one of the chief supports of the social edifice, is founded. There is no higher or more arduous question in the philosophy of law.

That intelligence has the empire over things,—that man

is the lawful master of non-intelligent nature, delivered to him for his use,—is a truth too evident to be contested.

That the world has been given, not to one or to several men, but to the human race; that sociality is a law of our physical, intellectual, and moral organization; that the state of society,—a necessary state,—has created for men an order of duties, which they are essentially constituted to comprehend, and the care of which is confided to each individual conscience, even before it is assumed by positive laws; that, in the first rank of these duties, is placed that of respecting in our fellow-men, personality, reason, liberty, holy in them as in ourselves; that from thence results a moral limit to our empire over material nature, a limit which consists in a respect for the rights of others, in an obligation not to attempt to appropriate to our own use those portions of matter already appropriated by one of our fellow men: these are propositions, which philosophy has so well demonstrated, that it is quite unnecessary for us to stop to establish them by proof; they are acquired to science, which has a right to hold them as proved, and to take them for a point of departure.

These fundamental principles are not sufficient of themselves to establish and justify the origin and the conditions of this right.

Property, as it is defined by usage and universal consent, is an entire and absolute right over things, which is acquired by first occupation, by exchange (a contract which includes that of sale), by donation, by natural successions, regulated by the will of the law, and by testamentary successions regulated by the will of the individual.

The complete power of the proprietor,—the inviolability of his exclusive right,—the perpetuity of this right by the complete transmission of it from one to another;—these are the characteristics which the habits of the human race recog-

nise in property, and upon which the respect it receives is founded.

The right of property has had its adversaries; for one of the proofs of liberty, which the human mind has always given, has been to revolt against the best-accepted truths. Some have demanded a new social organization, founded upon a coöperation of all labors, and a community of all goods; others, acknowledging labor as the only lawful source of possession, have attacked hereditary transmissions, and the payment of rents to proprietors, who do not occupy or cultivate their estates themselves. It would belong to a supreme power only, to assign to each his share in the distribution of material things, according to the capacity or the utility of individuals and for the greatest general good.

I shall not trouble myself with a refutation of these paradoxes; not that they do not involve social problems of a high interest, or that the discussion of them might not lead to the establishment of important truths; but it is necessary to know how to set bounds to our inquiry, and to avoid the temptation of proving every thing and of saying every thing. I declare, therefore, that I take for my point of departure the common belief of the human race in the right of property. In another place, I shall set forth how and why I fully accept the wisdom and the truth of this general belief.

Not only do I believe in the right of property; but I am one of those who think that its establishment rests upon a necessary and natural right. I shall mention the reasons why I do not accept the opinion, which would reduce property to a mere creation of civil right, resulting from variable conventions, established by positive laws with a view to the greatest social utility.

The numerous partisans of this last opinion consider property to be lawful because it is useful; for, according to them, utility is the root of all right; one positive law has

created property ; another positive law may destroy it, and supply its place by a new combination. For those who hold this system, the controversy concerning the rights of the authors of intellectual productions may be reduced to the inquiry, whether, in this matter, it is useful or injurious to sanction a right, destined to be exercised, in all its plenitude, according to the rules and with the consequences which the existing law attributes to the property of material objects.<sup>1</sup>

But I neither will nor can thus limit the question, since I consider property as belonging to that necessary right, which constitutes what must be called the natural law ; a law superior to the arbitrary and accidental combinations of positive laws, which cannot reject it or substitute any thing in its place. If I should acknowledge in the rights of authors the character of property, my mind would not be at liberty to refuse them a single one of its consequences.

I shall first set forth the ground and the origin of the right of property, and, then, penetrating into the essence of the right of authors, I shall examine whether these two rights proceed from the same source and exist upon the same conditions.

What is the subject of the right of property ? and what is its object ?

The subject of property is man. The non-intelligent nature has been given to him to serve him, and that he might make use of it ; it is put into his power, and subordinated to his action. The things, which an individual or an association has not appropriated, remain a vacant good, a good useless to the human race, or rather they are not yet a good.

<sup>1</sup> Restrained to these terms, the question would be promptly resolved : for, as will be seen hereafter, grave considerations of general interest demonstrate, that there would be great danger to the social state, in subjecting the products of thought to the bonds of a perpetual monopoly.



The right over things would be illusory, if, for him who uses them, there were no stability, no security, no future. They cannot be used but upon these conditions. If, when a man gathers a fruit, any one might snatch it from his hand or his mouth; if, when he shelters himself under a roof, another might drive him from it; if, when he has cultivated and planted a field, the first comer might harvest it; who would be fool enough to cultivate the earth, to build a house, or to count for a moment upon the future? If this were the due order of things, providence, in delivering material nature to the human race, instead of furnishing it with the condition of its existence, would have thrown into the midst of it an inexhaustible source of discords and of wars; life would be impossible, sociality a chimera; and man would be surrounded by chaos and violence. It is therefore the law of man's nature that things should be exclusively appropriated.

To whom shall they be thus appropriated? Since all have originally a right over all things, he who first marks a thing with the seal of his right, can no longer be divested of that thing, without suffering injustice and injury.

The necessity of acknowledging the fulness of right in the person of the proprietor does not permit us to refuse him the right of exchange, of sale, of donation. He would not have all power over a thing, which he was interdicted from using, and in reference to which it was not lawful for him to transmit to another all his rights.

That which would take place, if possession were not respected at all, would equally happen, if respect for possession were for a limited time only; as, for example, if upon the decease of the proprietor, his goods should remain without an owner. In that case, the object abandoned would perish or remain unused; or, rather, given over to the chance of conquest by whomsoever might first seize upon it, it would at every moment be the occasion of war.

If it is important that neither time nor death should disturb the stability of property, who shall possess upon the death of the proprietor? who shall become proprietor in his place?

It is neither a pure caprice of the accidents of birth, nor an unconsidered and arbitrary provision of law, which, by consecrating the lawfulness of natural and testamentary successions, designates the legatee or the heir as the just successor destined to continue the person of the deceased.

No man is isolated on the earth; sociality is essential to the human race; society is a natural state. But society would not exist, if there were no gatherings together of individuals, if there were no aggregations of human beings, grouped around the heads of families and houses, of which those heads were the government and centre. It is by this cohesion of a multitude of partial societies, that the human race is held together and united. A proprietor possesses only upon the condition of performing certain duties. This condition requires him to nourish and educate his children, to contribute to the common expenses, to the charges of the state. His wife and children, his father and mother, his brothers and sisters, and his domestics, have a certain share in his goods, of which he is the dispenser, and of which he is prohibited, by the law in some cases, and in others by morals, from depriving them. After him, his goods remain subject to his debts; in the first place, without doubt, to his civil debts, but also to his natural debts. They will pass to the persons, towards whom the deceased was bound by the most intimate duties, and who will form one or several other centres of houses or families. If the deceased designates one of his associates, as the individual to whom his estate shall pass, this is the testamentary succession; if the law designates the person, this is the legal succession.

Through all the transmigrations of property, the character of perpetuity dominates, and continues it without interrup-

tion from the first occupant to those, who, by contract, donation, testament, or succession, represent him and supply his place.

Occupation is the first source of property; prescription is the second. Those, to whom goods have not come regularly by the occupation of vacant objects, or from the assignees of the first occupants;—those, who have been invested with them by conquest, war, or any other mode of spoliation, or by any other forcible act,—are usurpers and not proprietors. But, in default of the legitimation derived from the first occupation, the objects possessed by them may, in their hands or in those of their successors, acquire the character of property by the legitimation of prescription. This is a homage rendered to the necessity of the continuity of property. There is great sense in the axiom, by which prescription, the daughter of time and the mother of peace, is denominated the patroness of the human race.

Whatever may be the source of property, its essential characteristics are exclusive enjoyment, complete control, and transmissibility; all which are derived from the very nature of man, and are necessary to the plenitude of the right with which he is invested, as the master and king of nature.

We have studied property in its subject, which is man. It is now to be considered in its object.

Every object of property must be a thing susceptible of appropriation.

It is for this reason, that slavery is unlawful; for it supposes the appropriation of an understanding, whereas every understanding must remain free and its own.

Even in the non-intelligent nature, there are some things, the use of which does not require an exclusive apprehension perpetually transmissible.

The division of things into appropriable and unappropriable is not new. It was recognised and admirably developed by the Roman jurisconsults.

There is necessity, utility, and justice, in attributing appropriable objects to exclusive proprietors; but to attribute unappropriable objects to exclusive proprietors, is to impoverish humanity entire. It is not necessary, since private interest has no need to trouble itself in their care or preservation; it is not useful, as the value of these things suffers no diminution by their being used by every body; it is not just, for every man has a right to what he can appropriate to himself without any prejudice to the rights acquired by others; and if an object is such, that every subject may have the full and complete enjoyment of it, without preventing any other subject from enjoying it fully and completely, to appropriate it to a single individual would be an intolerable usurpation.

The same portion of earth cannot be cultivated or possessed by all; but air and fire are universal riches. There is a vast family of these goods, the common patrimony of the human race, and the gift of a liberal providence to each of its members.

In this great division of objects into appropriable and unappropriable, to which of the two classes belong the products of intelligence,—the works of science, literature, and the arts?

These productions and works, what are they? A novelty of combination in the results of thought. But how can any one doubt, that thought, by its very essence, evades all exclusive appropriation? When it passes into the minds which receive it, it does not cease to belong to the mind from which it emanates; like fire, it communicates and extends itself, without burning less brightly on its own hearth.

From the fact, that the limitation of thought by exclusive appropriation is not necessary, the human race has a right to conclude that it is not permissible. If a field, or a fruit, or any object whatever, which is in its nature appro-

priable, is delivered to all, or if all desire to take possession of it at the same time, it is clear that no person will enjoy it. On the contrary, the propagation of thought, instead of injuring, strengthens, augments, enlarges it; happy that all can enjoy it, the human race derives therein its dignity and its life. To propagate, improve, and complete its diffusion, is for humanity the highest kind of progress.

The perpetuity of property is agreeable to our social habits. A piece of land, a house, a movable, are possessed exclusively, and transmitted by succession. An author says to himself: I have created a work, which is worth as much as a movable, or a piece of land, why should not my children have the enjoyment of it, in the same manner, as other children enjoy the goods left to them by their fathers? These considerations are powerful. It cannot be denied, that if the author had applied the powers of his mind in speculating, laboring, planting, or building, he might have thus increased the patrimony of his children, during that period in the family life, when it is upon the father and not upon the children, that the duty of labor is imposed, and when the tender age of the latter precludes them from doing any thing for themselves. But, if we attend to this matter a little, we shall see how the best truths are mutilated and ruined by being exaggerated. It is necessary, that the labor of the fathers should be for the profit of the children; but it is not necessary, by according a right of indefinite property in objects, the essence of which does not require that they should remain for ever appropriated to exclusive detainers, to establish the principle, that the labor of fathers has for its result to favor without term or limit the idleness of children, to the detriment of the whole society. To extend transmissions by way of inheritance beyond those cases in which inheritance is indispensable, is to go farther than to consolidate property; it is to found a nobility, and to build up, on the

ruins of common right, exceptions and favors repugnant to our social order.

The conclusion from what precedes is, that, there does not exist, in the nature of the creations due to the labors of authors, that character of property, which has for its condition and consequence the perpetuity of indefinite transmissions.

Here arises an objection, which has been too frequently renewed, not to merit a serious attention. If the question be confined to the mere thought itself, it is readily conceded that it is unappropriable; but, it is said, that, besides the thought, there is a further creation of the author in the productions of the understanding. When a manuscript, a picture, or a book, by taking a body, has marked with the stamp of its form a certain portion of matter, the paper, the canvas, or the colors, have become the *Athalia* or the *Transfiguration*. The material book, the body of the printing, is susceptible of property. Why should not this property possess all the characteristics of that of any other material object?

This objection rests upon a confusion. The right which we are examining is not that which consists in being the proprietor of the material body of a book or of a picture; it is that of reproducing the picture or the book; it is the right of copy. There is no doubt, that the exercise of this right creates and produces appropriable objects. But that is not the question. Our inquiry is, whether this creative right is susceptible of being appropriated. A poet creates verses. The paper, which materializes the emission of them, is an object of property; the hundred thousand copies in which these verses are reproduced are susceptible of becoming the property of an individual, or of a thousand, or of a hundred thousand. But the poetry itself, the power of each individual to identify it with his own understanding, the possibility of reproducing by repeating or

writing it,—is not appropriable. The thought, the faculty of emitting it, the power of reproducing it, must not be confounded with those portions of matter which have become books, and of the property in which no person can deprive the owner, even though every body should reproduce similar books, and should reimpres upon other material objects the emanation of the same thought. The mind, which first combined or created the thought, does not physically possess for its materialization a more energetic power, or a more special aptitude, than any other mind, which, after having apprehended and comprised it, will be as fully able to reproduce the thought materially, as if it had been the original creator. To enable me to impress upon such or such a portion of matter the form of this thought, which, by falling under the aperception of my understanding, has penetrated its intimate essence, I have thenceforth no need of any one's assistance. A positive law or a particular agreement may, in this respect, limit or suppress my right; but, if I am bound by a law, or chained down by a compact, they deprive me of a faculty which I have acquired, and, which, without the express prohibition of a law or of a compact, would belong to me as fully as to the original creator of the thought.

The material representation of the thought of an author gives birth to a value which may be sold and used; and this creation of new values, added, by the power of their minds, to the general mass of riches, is not one of the least titles of good writers to the public gratitude. But, does it follow, that the spiritual element which enters into the composition of these values is appropriable? Certainly not. Further: considering books only in their material existence, and in relations purely industrial and economical, we shall perceive, that the essential and necessary part of the spiritual element in the creation of their value is limited to securing

the reimbursement of the expense of manufacture and sale; an expense which would be lost, if the book, rejected by the public, should only be productive of a loss of industry, and a debasement of the original materials by the conversion of white paper into printed sheets. A short analysis of what constitutes the lucrative and venal part of a book, by establishing this proposition, will demonstrate, that no portion whatever of benefit for the author can enter into the price of a book, except so far as it is voluntarily introduced there by the operation of a law.

In order to publish a book, the material of a printing office, types, presses, and ink, are necessary; there must also be workmen to put this material in operation; an undertaker, to oversee, lodge, and pay the workmen; a direction, to correct the proofs and to see to the beauty of the typographical execution of the work; the printed sheets must be collected together, folded, sewed, and bound; and the edition must be warehoused, advertised, and sold. Each of these operations requires intelligence, and labor, as well as funds. The entire sale of the edition ought, therefore, to repay the funds employed, together with the interest thereon; and to pay the undertakers a profit, a price for the employment of their understanding and their time, for the use of their capital, and for the risks incurred. If a publisher should raise the price of a book, which any one was at liberty to print, above these necessary expenses, free competition would soon bring forward another publisher, who, by selling the book at a less price, would obtain the preference among buyers.

In regard to the intellectual value of the book, what proves that this passes for nothing as an element of the price, is, that the more the work deserves the favor of the public, and the more certain its sale, the lower the price of it may be reduced. Print a *Campistron* and a *Racine*; and, most certainly, you will be obliged to sell the former at a



dearer rate than the other, not that it has a greater literary value, but, on the contrary, because it has less. The sale being less sure, and therefore likely to be slower, it is necessary to charge a much higher price, on account of the risk of non-sale, and the longer use of capital and interest. Add to this, too, that the excellence of Racine, by multiplying the editions, obliges the bookseller to confine himself to the smallest possible profit, in order to maintain a competition.

This is the case, when a book belongs to the public domain, or, in other words, when there is no price to be paid to any one in order to acquire the right to print and sell it; the spiritual value of the book is commercially equal to zero, and the inevitable effect of competition is to efface all the elements of price other than those of the manufacture and sale of the book.

In order that it may be otherwise, the inquiry must relate to a book which is reserved to the private domain; for then the expenses and profits of bringing it into the market no longer constitute the only elements of the price. Another is added, namely, the payment to the author for each copy delivered to the public. The public must pay this supplement of the price, so long as there exists an exclusive right respected in the person of the author or of his assignee.

It is a gross error to believe, that, in reference to this question, there exists a conflict of interest between authors and booksellers. When a book is of private domain, the benefit of the exclusive right is divided between the author and the publisher, who consequently has an interest in the existence of this exclusive right. The devolution of a book to the public domain confers, it is true, the right of printing it upon all; but under the condition of a free competition, which, of all the causes that operate to diminish the price, is incontestably the most efficacious.

If it be true, that, in the present state of our law, it is nonsense to suppose, when no compensation is made to the

author or his representatives, that a present is made to the booksellers, it is just to remark, that it has not always been so; it was really a matter of grave controversy between authors and booksellers, when the right of printing and selling was the object of exclusive privileges, in those persons who devoted themselves to that form of industry. It was then necessary to add to the price of manufacture and sale, not only a price for the author, but also a sort of rent, attributed to a privileged and incorporated profession. Hence the charge upon the public was enormous. The authors had strong reasons on their side, when, in opposition to the factitious privileges of the booksellers, founded upon the limitations, wholly conventional, which shackled the free exercise of professions, they set up the claim of a right in their works, a right founded in justice and labor. But where the authors of that period erred, was, that in order to maintain their doctrine, they undertook to assimilate their right in their works to a true right of property. The error has become more striking and more serious, since there are no longer any privileged booksellers.

The state of things which then existed, in consequence of the corporate organization of the booksellers, may be comprehended by a comparison of the state of things at the present day, with relation to dramatic works. In the case of a theatrical representation, if the public wish to enjoy it, they must not only pay the expense, risk, and profits of the theatrical enterprise, together with the price, in consideration of which, the author accords the right of representing his work, but also as a part of the price a further sum, which corresponds in a certain proportion with the privilege of the theatre. If the theatres were free, this last element would cease to enter into the price of dramatic representations.

The conclusion from the observations which precede is, that the faculty of copying intellectual products, so long as

it remains free and universal, possesses no saleable value. It acquires this sort of value only by becoming a right reserved. In its nature and in the absence of restrictive laws, it is universal, unlimited, and unappropriable, as much as thought itself.

Published thought is only susceptible of being copied and reproduced, because it has been uttered. From this fact, the partisans of a literary property draw the consequence, that, inasmuch as the author, before emitting his thought, is the absolute master of it, and may give it to the public or not, as he pleases, he may also, in giving it to the public, make his own conditions, give one part of the enjoyment and reserve another to himself, cede to all the intellectual enjoyment, and reserve to himself the right of sale, the useful domain. It is thus, they add, that the proprietor of an immovable may alienate in part, and in part retain the rights which belong to him; he may, for example, alienate the right of habitation, or the right of culture, and retain the right of the chase.

This course of argument rests upon the error which has already been pointed out, and which consists in confounding two objects of right, whose want of resemblance modifies the nature of the right itself. The emission of thought can only take place by its realization under some material form. such as speech, painting, writing. If an author wishes to make known his thought, it is absolutely necessary that he should utter it. This thought, once uttered, penetrates the understandings to which it comes, not because the author consents to it, but by this alone that he has emitted it. It is not possible, that any other conditions should be made. To give and to retain a thought is an impossibility, an absurdity; and no one has the power, by a mere exercise of his will, to divide that which by its nature is indivisible. No hypothesis of reasoning can prevail against a reality so evident.

To conclude, thought is essentially unappropriable; and the faculty of copying and of reproducing thought is not less so.

## VI.

*The expression literary property ought to be discarded from juridical language.*

The proper employment of words is not a matter of trifling importance. When they are confused or ill made, they introduce obscurity or disorder into the ideas of which they are the signs. I have no fear in saying, that the prejudices, which obscure the matter we are now considering, derive their principal strength from the right of citizenship, which the writers, an interested party in this controversy, have given to the expression, *literary property*, by the help of which they have habituated people's minds to their pretensions.

In its primitive sense, property means that which is *proper*, peculiar, to such a person, or to such a thing; that which belongs to its essence; that which distinguishes one person or thing from every other person or thing. Thus, it is proper to man to be free; it is proper to animals to feel, to grow, and to move; it is proper to matter to be extended, divisible; in other words, liberty is a property of man; feeling and locomotion are properties of animals; extent, divisibility, are properties of matter. In this sense, it is very true to say that thought is the property of man; that the thoughts of each man are his property.

But it is not according to this rigorous and primitive acceptance,—it is in virtue of an extension given to language by analogy, that our field, our house, our clothing, our book, are called our property. These objects are not *proper* to us; they are *appropriated* to us. The influence of language has modified the original signification of words

to such a degree, that the only objects of which man is called the *proprietor*, are those material external objects, which do not make a part of his person, but are accidentally found attached to him by mere appropriation. We do not say, that a man is the proprietor of his liberty, an animal of his locomotion; that fire is the proprietor of heat, matter of divisibility. One is only said to be the *proprietor* of objects, in regard to which his right is derived from *appropriation*.

If the word *proprietor* has but a single meaning, that of *property* has retained both. When we speak of property, however, as of an object of right, this word, in the legal and juridical sense, designates only the exclusive right derived from appropriation; and it is with property thus understood, that the laws occupy themselves. The expression, *property*, used to designate the qualities and the intimate essence of being, has no place in the language of law.

The thought of every man is proper to him. If we have succeeded in demonstrating, that this thought, when once emitted, will no longer be susceptible of appropriation, it follows, that the right of property, in the legal acceptance of the term, may be applied to the portion or portions of matter, upon which the form of the thought shall have been imprinted, and, for example, to such a volume, or such a picture, but that it will never extend to the thought itself, any more than it will to the faculty of copying, of reproducing, or of imposing its stamp and form upon any portion of matter.

The expression *right of copy* made use of by the English and Germans is much more just. It does not confound the first emission of the thought with its reproduction; nor the material property of each of the copies of a work with the intellectual possession of their contents. It opposes no obstacle to the more or less extended establishment of the rights, which the laws may guarantee to the author.

The expression *literary property* confounds all these ideas. We shall refrain from the just criticisms to which the word *literary* is subject; and shall attempt merely to show the improper use made of the word *property*; because that is the important word, and because the language of the law cannot admit this use of it, without falsifying its meaning, and separating from it the essential characters of transmissibility, perpetuity, and inviolability, which must always be connected with it.

## VII.

*A book is the undertaking of a service towards society.*

A book is a writing by which the author addresses speech to the public; a use which he makes of his faculties to put in circulation the conceptions of his mind; it is a service which he renders to society by communicating to it his ideas.

This definition is that of Kant, who takes care to explain, that, in thus expressing himself, he does not speak of the material copy of the book, the mute instrument of communication with the public, but of the book itself, its contents, its words.

As to the creation of new riches by the faculty of converting into books certain portions of matter, the utility of which is susceptible of increase by this conversion,—this is also a service, for which society is accountable to the author.

## VIII.

*An author has a right to receive from society a just price for his service.*

Respect for property is one of the foundations of the social order; but it is not the only one upon which the social order rests.

Some portion of material property is indispensable to the life of every man. All have need of being the proprietors of food for their nourishment, of garments to cover them, and of roofs to furnish them with shelter.

It is given to some men to be born provided with goods; others, and this is by far the greater number, obtain with great difficulty, and only as they want it, that portion of property which their necessities require.

This unequal distribution of goods is the result of liberty; but the law of providence, which, by the mediate or immediate and always necessary consequences of liberty, leads the world to an inequality of goods,—this law is concealed from us. Our ignorance, which looks upon it as blind, calls it chance. Those who trust in the divine goodness respect the unknown rule, the secret of which God has reserved to himself, and in virtue of which he chooses one to be born rich, and another to be born poor, precisely as he clothes such or such a soul in a strong or a feeble body, or places a man in one part of the globe rather than in another.

To undertake to create an equality of goods would be a temerity, to which the hardest and most senseless of tyrannies would not expose itself. The earth cannot be assigned in lots perfectly equal to each individual of the human race; nor can movable goods, by a perpetual process of weighing, apportion their distributions and their measures equally among all. The finite and limited essence of appropriable objects, as well as the innumerable accidents of their transmission, tend to concentrate them in a number of hands infinitely small in proportion to the general population.

But if human laws have it not for their impossible mission to destroy this inequality, they have the difficult duty to perform, which is nowhere strictly observed, of not encouraging and increasing it. They will have enough to

do, if they impose it upon themselves as a rule, to destroy the factitious obstacles, which, by arresting the spring of individual activity, augment and aggravate the natural inequalities, or substitute in the place of them the heavier yoke of conventional inequalities.

But there is a force, the power of which comes, if not to establish a perfect equilibrium, at least to diffuse among men enough of property to assure the subsistence of all. This force results from liberty and human activity: it is labor.

If property were not respected, the most horrible chaos would take the place of social order. But the world would not be the less impossible, if, by the side of this respect, there did not coexist a principle not less serious and fundamental, the principle in virtue of which each one owes to the labor of others a reward proportioned to the utility which he himself derives therefrom.

Property of itself would not suffice for the life of any man. It is not enough to have a field; the owner must also, either by himself or others, cultivate, sow, and harvest it. Without labor, property would be inert, unproductive, dead matter; it would be absolute repose.

Labor in its turn would be nothing of itself. It is only by making use of material things, that man can obtain food, clothing, and physical enjoyments. Without the possession of matter, without property which is the right of perpetuity in this possession, labor would have neither object nor order: it would be a tumult, a combat, a chaos.

Property which is repose, and labor which is motion, must therefore coexist. Without their harmony, there can be no human life. What labor requires is liberty in the first place and afterwards payment; property has no right either to recompense or wages, but only to inviolability.

The law, which wills that all labor should receive its wages, is correlative to that which wills the inviolability



of property : each of them serves to guarantee and sanction the other. Exchange between property and labor, if it do not go so far as to establish equality among men, must at least create for all the possibility of living. A society is not well organized but upon this condition.

To what class do authors belong? Are they to be reckoned among the privileged of providence, to whom it has been given to detain a few of those material things, which some are permitted to possess exclusively of all others?

Their place, and it is their glory, is at the head of those who live by exchanging their labors and their services for the material objects of which other men have the property.

This labor, like every other, deserves its wages, and ought to be recompensed by a material price.

It is ideas which govern the world; it is by them that humanity is ameliorated, that the lot of individuals is enlarged, and the empire of intelligence extended over the powers of nature.

Reward authors; pay them their social debt. We have in no degree weakened the sanctity of this debt, by demonstrating that the production of ideas, the faculty of reproducing them, is not an object of property. The author, by giving utterance to thoughts which may be stamped upon matter, enables industry to fabricate books, and thus to create appropriable objects, destined to increase individual wealth. But by endowing humanity with a new combination of ideas, he does much more still; he enlarges the common treasure of ideas, which, without being proper to such or such particular individuals, is the vast reservoir to which all may resort, and which only grows and increases by the drafts that are made upon it. To deprive any laborer whatever of his wages is always an injustice. To withhold his reward from an author, the first of laborers, the artisan of the first of the goods of humanity,—the most extended, the most rapid, and the most complete

circulation of ideas,—would be an ingratitude ; it would, by the most improvident of calculations, strike with sterility the most abundant mine of wealth, the source of all riches ; it would be a social trouble.

## IX.

*The guaranty of an exclusive right of copy in the reproduction of a work is the best mode of remuneration on the part of society towards the author.*

It was for a long time thought, that writers and artists ought to be paid by pensions and favors ; and it was in some sort the state and princes, who thus acquitted the debt of the public ; but, whilst no scruple was felt at accepting these favors, authors were disposed to blush for a payment drawn from the public by the sale of the right of copy in their own works. Some of these notions have changed. No unfavorable prejudice now attaches to a sale made by an author of his works. On the contrary, a reaction has been produced. Industry has mingled itself with literature and has too frequently taken its place. Pensions and favors have not ceased ; but they have been banished to an accessory and secondary rank. Literary men no longer as formely have a separate existence, at the pleasure of princes and the great, to whose liberality they are indebted for peaceful leisure, and to whom they give praise and sometimes glory in exchange. Letters now lead to fortune, to employment, and to honors.

The moralist, who takes notice of this revolution, will find both good and ill in it. In the actual order of things, as in the old literary life, the passions, both great and small, the instincts, generous or mean, calculation and disinterestedness, have their action and their part. But, on the whole, ideas have improved. To live by the voluntary tribute, which the public imposes upon itself, is not humiliating to any position, or unbecoming to any genius.

There are insurmountable difficulties opposed to every mode of payment, which should proceed on the plan of pensions or of a fixed allowance; or even, with some very rare exceptions, upon that of a purchase for a price paid at once; which last would take the form of expropriation for the benefit of the public, if the author were not at liberty to refuse to accede to it. With such modes of recompense, distributive justice would be impossible; and there is no treasury which would suffice for the insatiable pretensions, the capricious favors, and the ready extortions, to which these methods of rewarding authors would open the way. If the plan of expropriation for the benefit of the public were adopted, who would pronounce upon that utility, and set a value upon the literary works to be taken? Who would appease rival claims? Who would do justice to mediocrity? Who would invent rewards worthy of genius without exciting envy? Who would make advances to proud or modest merit? If the estimation of the value of works to be purchased for the benefit of the public be attributed to the government, to what dangerous suspicions, to what low intrigues, to what ingenious corruptions, to what shameful gains, will not the administration be exposed, without speaking of the errors into which it must inevitably fall? But suppose the works of writers are to be valued by their peers: will it be safe to trust literature, disinterested, modest, and impartial, as it may be, with the decision of its own cause? Do magistrates and juries possess those habits of mind, and that peculiar knowledge, which are indispensable to the decision of so difficult a question? For my part, I perceive, on all sides, nothing but inconveniences and impossibilities. There is but a single just appreciator of the wages due to writers and to artists: the public. There is but a single just appreciation: that which the public, without establishing any rule beforehand, measures by the utility and the

pleasure which it derives from a work. One single mode of appreciation seems to me to be just and possible; it is, to allow an author, for each edition or for each copy of his work, a right of copy.

This means is that which experience has made known as the most simple; it is also the most equitable; for, in general, the most judiciously approximative valuation of the utility of a book consists in the success which it obtains. By the adoption of this mode, the remuneration of the author will be very much subdivided, and the price of each copy will be increased by the part which it bears in the general value assigned to the object of the copy.

This enhancement of the price of a book is, doubtless, an inconvenience; for cheap books are more rapid, powerful, and active propagators of ideas, than those whose price is dearer. But there can be no payment of authors, unless recourse is had, in some way, to the public, to furnish it. To increase the price of a book, in order to pay the copy-right, is to establish a sort of impost. Now, an impost, though always inconvenient to the public, is legitimated by its destination, when it returns to the public, in the form of general expenses, in individual security, in efficacious guaranties, more than it takes from each contributor. It is buying the cheapness of a book too dearly, to refuse to pay the author, to sacrifice him to his labors, and to discourage and debase him by want. The book will cost a little more; but it will see the light, and will not be stifled before its birth; and, above all, we shall not be guilty of an injustice towards the author. To say, that one would prefer to pass a bridge or canal, without paying any thing, rather than to reimburse the expense of it by a toll; that one would like to be defended by an army, without paying the soldiers; judged by tribunals, without paying the judges; instructed or amused by an author, without paying him for his labor; by a bookseller, without paying him the expenses of carrying on his

business; by a printer, without paying him the expenses of his trade; by a laborer, without paying him for his cultivation and seed; would be setting up the strange pretension of receiving every thing from society, without contributing any thing in return, and of making use of our fellows as if they were not our equals; it would be the overthrow of every social idea.

This impost laid upon a work in favor of an author may be collected in two manners. The one consists in interdicting to every body but the author and his assignees, the faculty of fabricating and selling the work; the other would be, to leave every one at full liberty to fabricate and sell the work, but subject to the condition of paying a certain sum to the author by way of compensation. The first system establishes a privilege, the second a rent.

The second system may be the most attractive on a first view. Many persons, who are unwilling to renounce the notion of the right of copy being an object of property, would prefer having recourse to a rent, in order to preserve, by a sort of sovereignty, which may be indefinitely extended, some image of a property indefinitely transmissible. The order of ideas would thus be satisfied, which, separating the spiritual from the lucrative part of each work, delivers the enjoyment of the first to the public, and retains only the second as an article susceptible of sale and profitable use.

We shall not occupy ourselves with the objections which might be urged, either against a very long duration, or the perpetuity, of a rent. These arguments might be applied with equal force to the extension, which one might attempt to give to the duration of privileges. We will examine the inconveniences inherent in the system of rent considered in itself.

This plan is inadmissible, by reason of the impossibility of fixing the amount of the rent, and the excessive difficulty of collecting it.

The obstacles in the way of collecting the rent might, perhaps, be surmounted by great care ; but, it is impossible, by any regulation, to fix the amount of it.

This amount cannot depend either upon the arbitrary will of the author, or upon the valuation which any person, who desires to make use of the right of copy, may think proper to make. To allow the debtor of the rent to fix its amount is a manifest absurdity ; but it would be absurd, in the same degree, to permit it to be fixed by the price which the author should demand. This would, in fact, be the same as conferring upon him the privilege of selling his work, and it would be a thousand times better, to attribute to him the monopoly of it at once, than to arrive at the same result in an indirect manner.

Shall the law be required to determine the amount of the rent ? But what can be more unjust than a fixed measure applied to objects which are essentially unequal ? Shall the number of copies, the size of the volume, or the price, be taken as a basis ? There are some works, the consumption of which can never exceed a hundred, five hundred, or a thousand copies ; whilst there are others, which are sold by tens and hundreds of thousands ; the size of the volume varies with all the caprices of publishers ; and the price is more variable still. Without speaking of extremes of price, which are subject to the control of no one,—or of the extreme facility of fictitious prices and the impossibility of proving them,—we know that the *Telemachus* may be published at twenty sous a copy, in one form, and in another, which will not be too dear, at one or two hundred francs. In connection with the text which does not vary, we must take into consideration the paper, the type, the typographical skill and care, and the accessory ornaments, by engraving or otherwise, all which objects are variable to infinity. If the basis of the rent be a proportional value, each *Telemachus*, of which the price is two hundred francs, will produce

for the copy-right alone a larger sum, than each entire copy of the other edition is worth; and yet the text in both is precisely the same, and is no more valuable in the one than it is in the other.

Another mode of fixation remains; which consists in an estimation by experts, variable according to circumstances, in case of disagreement between the debtor of the rent and the author. But, who does not see the expense, the delay, and the litigation, to which every case would give rise?

This question is decided by reasoning precisely as it has been determined by experience. The exclusion of every other acceptable system leads necessarily to the adoption of privileges destined to guarantee a monopoly of the manufacture and sale, either to the author alone, or to him and his assignees. All the existing systems of law, whilst they adopt these privileges, make them temporary. The practical grounds of this opinion have been indicated by the profound understanding of Napoleon, in a discussion in the council of state.<sup>1</sup>

<sup>1</sup> "Napoleon said, that the perpetuity of property in the families of authors would be attended with inconveniences. A literary property is an incorporeal property, which, in the lapse of time, and by the course of successions, would become divided among a multitude of individuals, and would finally cease to exist for any body; for, how could a great number of proprietors, frequently at a distance from one another, and who after some generations could with difficulty be known, come to an agreement and contribute to reprint the work of their common author? But, yet, if they did not do so, and they alone had the right to publish it, the best books would insensibly disappear from circulation."

"There would be another inconvenience not less grave. The progress of light would be arrested; since it would no longer be allowable to comment on or annotate works; glosses, notes, commentaries, could not be separated from a text, which one was not at liberty to print."

"Besides, a work has produced to the author and his heirs all the benefit which they can naturally expect from it, when the first has had the exclusive right to sell it during his life, and the others during the ten years which succeed his death."

"Nevertheless, if it be desirable to favor the widow and heirs still further, let their property be extended to twenty years." *Loce, Legislation civile de la France*, t. ix. p. 17, 18, 19.

I have defined property. As to the definition of privilege, every one knows it; it is a private law, *privata lex*. It is unnecessary to add, on the one part, that there exist privileges which are perfectly legitimate; and, on the other, that to subscribe to the dogma of literary property is to decide, in a word, that a monopoly of the productions of the understanding shall be for ever concentrated in the hands of a small number of privileged persons.

## X.

*Perpetual privileges would destroy the rights which belong to society.*

To accord to an author, as a remuneration for his labor, and by a legal concession, a perpetuity of the monopoly which would exist by itself if the right which belongs to the author accrued to him as a proprietor, would be to arrive by another way at effects precisely identical with those of the right of property.

It has been seen, that hitherto I have undertaken to demonstrate, that the right of authors differs from the right of property, by studying these rights in their nature and in their cause.

It is time now to consider effects. Those which would flow from the adoption of the theory of a literary property being absolutely the same as those which would be produced by perpetual privileges, I shall not separate them in what I have to say on the subject.

The perpetuity of transmission, whether of privilege, or of property, would increase the price of books, and would expose them to destruction.

The perpetual enhancement of the price of books, the absolute destruction of all competition, both for the present and the future, by retarding the circulation of ideas, would be mortally prejudicial to social progress. But society would



not suffer alone; the fame of the author and of his memory would be lessened; his dearest and most noble wish, the propagation of his ideas, would be compromised and deceived. For the sake of paying a higher price to the author, we should restrain the influence of his services; we should diminish, with the utility of the work, the justice of the reward; we should weaken his claim upon humanity, by the very measures which we should take to exaggerate its value. The momentary enhancement, which temporary privileges lead to, has its inconveniences,—which cannot be avoided; a perpetual enhancement would be an evil without remedy.

In thus going beyond our object, we should run a great risk both of not obtaining it, and of injuring the very interests which we had an intention to serve; the wants of the general consumption, and the necessity of the diffusion of good books, would multiply counterfeits,<sup>1</sup> which would become the only corrective of the perpetual monopoly; the connivance of the public would excuse a crime by which the public would profit, but which, nevertheless, cannot any more than others be tolerated without danger and without leading to the habit of regarding private rights and the laws with contempt. A bounty, always open, in favor of foreign industry, would crush the domestic publishers, and destroy all the profits attached to the rights of authors, only to enrich fraud. When the privilege is merely temporary, the sacrifice is shorter; its justice is evident; and, yet, it is only preserved by the most active watchfulness. What would be the case, if it were to last for ever?

<sup>1</sup> The word *contrefaçon*, by which the French denominate the unauthorized publication of a book, and which we have translated by the word *counterfeit*, is very little if at all better than the English phrase, *pirated edition*. Originally the counterfeiter was one who reprinted a book already published, and *counterfeited* the certificate of privilege inserted at the head of the work.

An argument, in favor of the perpetuity of the rights of authors, may be drawn from the powerful encouragement which would be afforded to writers, by holding out to them the prospect of the creation of a property, which should be for ever transmissible in their family, and thus prevent the descendants of those great men, whose genius has enriched their country and the world, from falling into poverty.

This argument may for an instant have some effect, and, in many minds, may counterbalance the serious wrong, the irreparable injury, which would be done to the memory of an author, by the perpetual enhancement of the price of his book. But, before yielding to this argument, let us at least estimate its value. In order to render it efficacious, it would be necessary to prohibit alienations of an author's right in his work out of his family, and also to prohibit authors themselves from alienating their rights but for a limited time; this would be the only means of avoiding the sight of an author's family in indigence, by the side of an opulent assignee. Let us see what strange results would follow from this interdiction of alienation,—this derogation from the common law. Shall the author's right be divided, to infinity, among all his heirs? But, then, be the generations which succeed ever so few or the author's family ever so little extended, with whom shall third persons treat? How shall one unite so many divers consents, when it may be necessary to treat? Who will undertake to find so many scattered individuals, to regulate their respective interests, and to bring their different wills to agree? Add, too, that by the successive augmentation of the number of parties entitled, the part of each will be diminished by indefinite divisions and subdivisions, and finally reduced to nothing. Will it be attempted, in order to avoid a part of these inconveniences, to authorize licitations and divisions, in conformity with the common law? But, in this hypothesis, what becomes of the dream of putting beyond the reach of want

the name and the blood of the man of genius, whose works were to be protected for ever for the benefit of all his heirs? In no long time, some of the branches of a family will be ruined, whilst others will become opulent; and, thus, a part at least of the descendants of the same father will cease to profit by the fruit of his labors.

In order to attain to any efficacious result, it would be necessary to venture farther, and to go to the length of a free substitution. Create, therefore, an intellectual *majorat* at once. Give, by the right of the eldest, a powerful representation to the rights of authors.

All these hypotheses are senseless. If a glorious name should happen to be borne by men condemned to want, these are private misfortunes which may be relieved. The state may be generous towards them, as was Voltaire to the family of Corneille. But these are not considerations, which can authorize the violation of a right, in its nature and in its consequences. If the rights of authors were a perpetual property, it would be necessary that they should enter into commerce, like all other goods; and nothing could prevent the public from being burdened with charges altogether irreconcilable with the interests of the most precious of all consummations, that of the nourishment of the understanding.

When a son inherits the field of his father,—when an acquirer succeeds to his seller,—when, in fine, a property is transmitted in any mode whatever,—the new proprietor acquires in all their plenitude the rights which belonged to the former proprietor; absolute master of the thing, he may use it or not use it, preserve or destroy it. The assignees, who succeed either to the property or to the privilege of the author, will for ever be the sole lawful proprietors of all the copies of the book, not one of which can ever be for sale, unless it have originally issued from their hands or from those of their agents or mandataries. Here is manifestly

the possibility of an immense danger ; not of a partial loss merely of the book, by an enhancement of the price, but of its total destruction. When the habitual course of human transactions shall have brought a work into the hands of speculators, and concentrated all the copies of it in their possession ; when the lapse of generations shall have weakened or effaced the pious regard for the paternal name, where the privilege remains in the family ;—the fate of a work will be abandoned to all the calculations of indifference. Let it no longer be said, that uttered thought neither can nor ought to be destroyed, and that it is acquired to humanity. Not only will it become lawful for the avarice of every heir to paralyze the circulation of a work ; not only may his avidity retard or promote its propagation ; but every powerful party, every jealous government, every rival author, every speculation of competition, will have the power, by the aid of a little money, to destroy it entirely. The heir of Pascal will have it in his power to sell himself to the jesuits, and to interdict the circulation of the Provincials. Let us no longer make any account of that debt of all men, who owe to circulation the ideas they have borrowed from it, and who are bound to pay, to restore to the public, what the greatest geniuses, the most original minds, owe to their own age, to anterior ages, to their education, to what they have learned in the world, in books, and in conversation with the great minds of all ages. The works of genius will no longer belong to humanity ; they will become mere merchandise, to be quoted on the exchange.

These inevitable consequences of perpetuity are sufficient to do away with perpetual privileges.

These consequences alone, and independent of what is revealed, on the one hand, by the study of the right of property, and, on the other, by that of the right of authors, examined and considered in their origin and in their essence, would be sufficient to condemn by its effects the dogma of

a literary property. If theories commend themselves to our conviction by an examination of their causes, they are to be judged by their effects; practice is the touchstone of theory, as theory is the regulator of practice. If the principle of property, when we apply it to the productions of thought, cannot lead to any other than impossible or dangerous consequences; or, rather, if it do not conduct to results which are useful to humanity and the social well-being; we may, for this reason alone, boldly affirm that in this matter it is not the true principle; for, utility, if it is not the basis of systems, controls them; and, certain as it is that it does not create right, it is equally so, that we cannot avoid believing in that sovereign and wise harmony, which, in the laws that govern humanity, always unites the just with the useful.

Philosophically considered in its causes, literary property would be an error; regarded practically in its effects, it would be a social evil. I well know, that there is a sovereign and beneficent remedy for the errors of the human mind and its inability to seize clearly the truth, in refraining from carrying out the consequences of a principle. We do not desire that works of mind should perish, and we oblige their proprietors to publish them even against their will; we are unwilling that their price should render them inaccessible, and we determine the conditions of the price; we are unwilling to bind the future indefinitely, and we secure a reversion to the public domain; that is to say, we prefer being deficient in logic to being deficient in good sense; and, to preserve the word property, we readily sacrifice the necessary consequences which result from the right of property.

It is no doubt better to be illogical, than to act foolishly; but we ought to endeavor to be logical, and to abandon a theory, when its results are evidently false. It is by proceeding in a different manner, that skepticism is propagated. The more important a part the respect for property plays in

regard to principles in human societies, the more it is necessary to preserve it from those exaggerated extensions, which, instead of fortifying this great conservative principle, only expose it to be called in question.

To conclude, we are reduced to this alternative: either to shake the right of property, by proclaiming that it is inviolable and perpetually transmissible only in theory, and that its principle may be destroyed by exceptions, when we come to practical applications of it; or to deny that perpetuity and inviolability are the essential characteristics of property, in which case, we shall doubtless undertake to find other explanations of it, other conditions, other foundations, another nature.

These difficulties will all vanish, if, without seeking to aggrandize words by confounding ideas, we consent to recognise in the publication of a book what it is so beautiful, so easy, and so satisfying to see in it; a service rendered. The consequences of property, on the contrary, by weakening the service, and by exposing it to perish, render the problem insolvable, and prevent a compliance with the first of all the conditions necessary to establish the justice of payment to an author, namely, the necessity, in recompensing his labor, to maintain untouched the rights of society to the enjoyment of ideas, for the sake of the greatest glory of the author, and even for the accomplishment of his work.

## XI.

*The privilege ought to exist for the life of the author, and for a certain period after his death.*

In regard to industrial inventions, the privilege of inventors is fixed by our laws at five, ten, or fifteen years.

It is with reason that a longer duration is assured by the laws to the privilege of authors, in regard to productions of literature, science, and the fine arts.

The first reason, which may be mentioned in favor of such an extension of the privilege of authors, is not so universally true as to be relied on as decisive; it is, that as a book or a painting affords its author less profit, and more slowly, than many kinds of industrial inventions, the profit ought to be accorded for a longer period.

In the second place, an industrial invention may present itself to several minds at the same time. It is not so individual as a literary creation. The state of science, its wants, its anterior labors, may lead almost inevitably to inventions, in which the discoverer frequently has nothing more, indeed, than a right of priority.

But there is a third reason, which, of itself, alone, proves that the privilege ought to be for the life of the author. Literary labor engages the personality, the individuality, of the author, in the highest degree. A moral and even legal responsibility is attached to the publication of a book. The strictest justice requires that the author should have the entire control of the emission of his ideas; and nothing should be allowed to prevent him from taking them back, completing, retouching, and modifying them. He must have power to manage and combine at pleasure the publication of the works, with which his fame and his conscience are connected; and he should also remain the absolute arbiter of his intellectual communications with the public.

Justice, however, does not stop there; and it would not be equitable, even in regard to the author, to limit the duration of the privilege to the period of his life. If the privilege were merely for life, and consequently entirely uncertain in its duration, the author would find it difficult to conclude the commercial treaties necessary to the publication of his work. In all cases, where an advance of funds to a considerable amount is indispensable, the publisher must be able to reckon with confidence upon a cer-

tain duration of the privilege, within which the work may be published and sold, and the capital returned.

It must not be forgotten, that, while the advantage of the public is to be cared for, justice should also be done to the family of the author; and that considerations founded in the most rigorous justice require that the privilege should be accorded to his heirs, for a period long enough to be profitable to them. It is neither necessary to infeeoff a family with property indefinitely without labor, nor to interdict a writer from a thought of the future for the existence of his children. The head of a family ought not to be chilled in the midst of his labors by the thought, that they will be useless to those, whose well-being is dearer to him than his own, and over whose future welfare the most imperious duty commands him to extend a protecting foresight. The law cannot be indifferent to the performance of obligations, on the observance of which the spirit of family rests.

In bringing this long discussion to a close, I am happy to conclude with an approval of the system upon which the laws of my country are founded. We are too easily inclined to blame the laws under which we live. I felicitate myself on being able, even at the end of a tedious investigation, to render my homage to one branch of our law, which it is the fashion of the day to attack in the most pertinacious and wanton manner.

Our system of laws concerning the rights of authors is doubtless imperfect; it is especially incomplete in its details, and ought to be coördinated into a general law.

But to change its principle, which is wise, and to shake its foundation, which is solid, in order to improve its details, would be doing more harm than good. It would be a hundred times better to preserve our existing laws with all their imperfections.



## ANALYSIS OF KANT'S DOCTRINE OF THE RIGHTS OF AUTHORS.

Kant comprehends all his argumentation on the subject of the rights of authors, in two syllogisms: the first of which is destined to prove the right of the publisher; the second to refute the pretensions of the counterfeiter.

*First syllogism.*

"He, who conducts the affair of another, in the name of the proprietor and against his will, is bound to cede to the latter or to those having his authority all the gain which he derives from the affair, and to indemnify them against any loss which may result to them from his gestion.

"The counterfeiter conducts the affair of another (the author) in the name of the proprietor and against his will.

"The counterfeiter is therefore bound in favor of the author, or of his authorized agent (his publisher) to a cession of the gain, and an indemnification for the loss, resulting from the unauthorized printing and sale of a work."

We shall only present the arguments by which Kant supports the minor of this syllogism. He divides the discussion thus: 1, the publisher, whether authorized by the author or not, conducts the author's affair; 2, the counterfeiter conducts the affair against the will of the author.

1. *The publisher, whether he be a counterfeiter or not, conducts the affair of the author.* In order to establish this proposition, Kant inquires, in the first place, what is the true idea of a book; and, secondly, what is a publisher whether authorized or not.

"A book is not, for the author, an article of merchandise, an object of commerce; it is a use of his powers (*opera*) which he may concede to others, but which he can never alienate. Every book is a writing of the author, by

which the latter speaks to the reader. He who prints this writing does in fact also speak to the public by the copies; but he does not speak for himself; he speaks in the name of the author; he presents him publicly as speaking; he is the intermediary between the author and the public, to transmit to the public the words of the author. Every copy of these words, whether manuscript or printed, is an object susceptible of private property; the proprietor may make use of it himself; he may make it an article of commerce in his own name. But, to make any one speak publicly, to carry his words as such to the knowledge of the public, is to speak in the name of the author, it is to say to the public: "by my intervention, the author imparts to you in words such or such a thing; I am answerable for nothing, not even for the liberty which the author takes in speaking publicly to you by my organ; I am only the intermediary between him and you, charged to transmit his words." There can be no doubt, that a publisher, acting in this manner, conducts an affair of another; we cannot regard it as his own. In truth, the publisher furnishes in his own name the mute instrument by which the words of the author are transmitted to the public,—an instrument which is not a thing, but an employment of the powers of the author, *opera*, that is to say, *literal words*; but it is entirely evident, that it is in the name of the author, that the publisher, by means of the press, carries these words to the knowledge of the public; it is only in the name of the author that he presents himself, as him by whom the author speaks to the public.

"2. *The counterfeiter conducts the affair against the will of the author.* In fact, he is a counterfeiter only because he encroaches upon the powers of him whom the author has charged with the publication of his book; and the question arises, whether the author has a right to accord to a third person the same powers which he has

already conferred upon a publisher, or to consent that a third person should exercise these same rights. Now, it is evident, that as each of these two individuals, namely, the original publisher and the counterfeiter who arrogates to himself the right to publish, would conduct the affair of the author with the same public, the gestion of the one would render that of the other useless and would be prejudicial to him. Thus, we ought to regard it as impossible, that an author should be permitted to add to the agreement with his publisher a clause by which he should reserve to himself the power to accord to others also the permission to publish the same writing. From whence it follows, that the author has no power to give this permission to a third person, to the counterfeiter, and that the latter cannot even presume the consent of the author. From all which it results, that an unauthorized publication is the gestion of the affair of another, in the name of the proprietor, but in opposition to his legal will.

“It follows equally from this argument, that it is not the author, but his publisher, who is injured by the counterfeit publication; for, the author having abandoned to the publisher the gestion of his affair with the public, to be disposed of by him entirely and without reserve, the publisher is the sole proprietor of this gestion, and the counterfeiter injures the rights of the publisher, and not those of the author.

“However, as this right of gestion of the affairs of the author may be equally exercised by a third person, and is not inalienable in the nature of things, *jus personalissimum*, but only in so far as it is made so by the agreement of the parties, the publisher has authority to cede his right to a third person, because he is the proprietor of the procuration. The proprietor cannot refuse his consent to this cession, and the cessionary cannot be denominated a counterfeiter: he is a publisher clothed with a legal power, as

having the rights of the original publisher constituted by the author."

*Second Syllogism.*

"The property of a thing cannot, by itself alone, import an affirmative personal right in reference to a third person.

"The right to be the publisher of a writing is an affirmative personal right.

"This right therefore cannot result from the property alone of a copy, which is the property of a thing.

*Major.* "A necessary consequence of the property of a thing is the negative right of the proprietor to oppose himself to all undertakings on the part of third persons, which tend to create obstacles in the way of the unlimited use of the thing by him; but the simple property of a thing cannot import an affirmative right in reference to the person, namely, the right to require of that person any responsibilities or services. This right may be established, indeed, by a particular clause of the contract, by which the acquisition of the property is made; and, consequently, one may stipulate, at the time of the purchase of an article of merchandise, that the seller shall be bound to send it free of expense to a particular place. But, in this case, the right in reference to the person, the obligation to do, does not result from the simple property of the object sold, but is the effect of the additional clause."

*Minor.* "I have a right in a thing, when I can dispose of that thing at will and in my own name. If I have the faculty of disposing of it only in the name of another, I conduct the affair of such other; and the latter is bound by my gestion in the same manner as if he had himself administered his own affairs: *quod quis fecit per alium, id ipse fecisse putandus est*. It follows, that my right to conduct an affair in the name of another is an affirmative personal right, in that I can compel the proprietor of the affair

to assume a certain responsibility, namely, the accomplishment of the engagements which I have contracted in his name. The publisher speaks to the public, by means of the press, in the name of the author; he therefore conducts the affair of another. From which it follows, that the right of gestion is a right in reference to the person; it consists, not only in the faculty of defending one's self against the author, in making an unlimited use of the property, but also in the power of forcing the author to recognise as his own all the acts done by the publisher in his name, in the affair in question, and to be responsible for them; and this is an affirmative personal right."

*Conclusion.* Kant recurs in his conclusion to the distinction between the property of each copy, the work of the author (*opus*), and the affair which the author conducts with the public (*opera*), in addressing his language to it, by the aid of his book and by the intervention of his publisher. He remarks, incidentally, that the publisher, if he is at the same time the author, conducts two different affairs, and, in his commercial character, is the publisher of what he has written as an author; a case which it is useless to examine specially, since it is easy to apply to it the same reasonings and the same results, as when the author and the publisher are two distinct persons. The author and the proprietor of each copy, he remarks, in another place, have both the right to say: it is my book. But this expression has a different sense in each of the two cases. The author regards his book as a writing, as words; the proprietor considers his copy as the mute instrument which communicates to the public the words addressed to it by the author. The right of the author is not a right in the thing, in the copy; for the proprietor may burn the copy before his eyes; it is an innate, personal right; it is the right to prevent a third person from making him speak to the public without his consent. He,

who undertakes to become the publisher without a previous agreement with the author, or, where the latter has already accorded the right of publication to another, without an agreement with the latter, is a counterfeiter; he injures the rights of the true publisher, to whom he ought consequently to pay damages."

After the development of these two syllogisms, Kant offers some additional general observations. It will be seen, that the course of his reasoning leads him to deny the rights of authors, in reference to objects of art, and to industrial inventions. I am far from adhering to these consequences, and I do not adopt but in part the principles which Kant has established as his point of departure; but, at this moment, I must confine myself to analyzing his dissertation without discussing it.

"I have said, that the publisher does not conduct the affair in his own name, but in the name of another, the author, and that he cannot cause it to be conducted without the consent of the latter. This proposition is confirmed by the existence of certain obligations, which, according to the common opinion, rest upon the publisher.

"If the author dies after having placed his manuscript in the hands of his publisher, and after the latter is engaged in causing it to be printed, the publisher cannot consider the manuscript as his own property and destroy it. If the author leaves no heirs, the public has the right to force the publisher to publish the work, or to cede the manuscript to some other person, who may offer to become the publisher. In fact, the question relates to an affair of the author with the public, and, in which the publisher has consented to serve as intermediary. It is not necessary, that there should be a previous knowledge and an acceptance, on the part of the public, of the promise of the author; the public may require the accomplishment of the obligations of the publisher in virtue of the law alone.

The publisher has obtained possession of the manuscript only upon the condition, that he shall make use of it in an affair between the author and the public; his engagement towards the public subsists, though that which existed between him and the author is extinguished by the death of the latter. The reader will see, that I do not rely upon any pretended right of the public in the manuscript. My argument rests upon the existence of an affair between the author and the public.

“If, after the death of the author, the publisher should publish his work in a mutilated form or falsified, or should not print a sufficient number of copies, the public would have the right to require a scrupulous fidelity and an increase of the number of copies: and, in default of the publisher’s complying with his obligation in this respect, the public might accord the right of publication to another publisher. All this could not take place, if the right of the publisher did not result from an affair between the author and the public, which the publisher conducts in the name of the former.

“These obligations on the part of the publisher being once admitted, we must also admit for his benefit the existence of a correlative right, without which he would not be in a situation to fulfil his obligations. This right consists in the power of causing the publication of the writing to be interdicted to every other person, because a competition in affairs of this kind would render it impossible for the publisher to conduct them.

“In this respect, there is a great difference between writings and objects of art. He, who has acquired a copy of these last, may imitate or mould them, or sell copies of them publicly, without the consent of the author of the original or of the persons employed by him to give a material form to his ideas. A design, which the author has caused to be engraved upon copper, or to be executed in

stone, metal, or plaster, may be reprinted or moulded by the buyer, who may publicly sell the copies thus produced ; in general, whatever I can do with my own thing in my own name is permitted of itself, without the consent of any other. Mr. Lippert's collection of impressions of ancient gems might be imitated by every possessor, of sufficient skill to do so, and the inventor could not complain of these imitations being exposed to sale ; for this collection is a work (*opus* and not *opera alterius*) ; every possessor may sell it without indicating and engaging the name of the author ; and he may consequently imitate it and sell the imitations which are his own work. The ground, therefore, on which all works of art may be imitated, and their imitations publicly sold, whilst the counterfeiting of books published by a publisher lawfully constituted is unlawful, is, that the first are works (*opera*) and the second actions or facts (*operæ*) ; the former exist of themselves, whilst the latter exist only as the emanation of a person. Thus, a book, which must be distinguished from its copies, belongs exclusively to the person of the author, who, in this respect, enjoys the inalienable right, *jus personalissimum*, of speaking himself by the organ of another ; that is to say, no person is authorized to communicate to the public the words of the author otherwise than in his name.

“ A change in the writing, however, by abridging, enlarging, or recomposing it, so that it would be wrong to attribute it from thenceforward to the original author, ought not to be considered a counterfeit ; it would be a new composition made in the name of the publisher. In fact, another author then conducts by his publisher a different affair from that of the original author ; the second publisher does not encroach upon the affair which exists between the first and the public ; he does not present to the public the first but a different author as speaking by his organ.

“ In like manner, a translation of the writing into an-



other language is not a counterfeit; for the translation does not contain literally the words of the author, though the ideas may be the same."

The principles of Kant have not been adopted by all the publicists and jurisconsults of Germany; and, there, as well as in France, the theory of the rights of authors is still the subject of controversy. But, I have thought, that, in a treatise on a matter which Kant has discussed, his opinion could not be passed over in silence. It will be seen also, by a perusal of the different laws, which have been adopted in Germany, on this subject, that the theory of Kant has sometimes had an influence in their composition.

L. S. C.

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ART. IV.—CRUELTY TO SEAMEN:—CASE OF NICHOLS AND COUCH.

A good deal of interest has been felt by the community at large, and by the legal profession in particular, in the late trial and sentence of the master and mate of the ship *Caravan*, for cruel treatment of a seaman. As the sentence pronounced by judge Story, which created much surprise at the time, is founded upon and partially exhibits certain principles in the application of an important statute, and certain rules of court as to the credibility and weight of the testimony of a large class of witnesses, which must give it great importance with the profession and the public, it has been thought worth while to prepare a notice of the case, to which the writer has ventured to add a few remarks of his own, hoping that they may at least have the effect of calling the attention of abler men to the subject.

The statute of the United States, of March 3, 1835, passed expressly for the protection of seamen against the cruelty of their officers, enacts that—"If any master or other officer

of an American vessel on the high seas shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew of such vessel, or withhold from them suitable food and nourishment, or inflict any cruel or unusual punishment, every such person so offending shall, on conviction thereof, be punished by imprisonment not exceeding five years, or by fine not exceeding \$1000, or by both, according to the nature and aggravation of the offence."

Under this statute, William Nichols, master, and William Couch, mate, of the ship *Caravan*, of Newburyport, were arraigned upon an indictment charging them with unjustifiably beating, "with malice, hatred, and revenge," Henry Burr, cook of the said ship, on a voyage from Liverpool to Boston, and who died upon the passage; and also for inflicting "cruel and unusual punishment" upon the deceased.

It appeared by the evidence for the government, that Henry Burr was a foreigner, and shipped on board the *Caravan*, at Liverpool, as cook, a day or two before she sailed for Boston, and proving unfit for his duty was turned into the forecabin and required to do the duty of a seaman. A few nights after the vessel got to sea, an order being given to reef the foretopsail, and Burr not laying hold of the reef-tackle as a sailor should have done, the mate struck him twenty or thirty blows with the foretopsail halyards, continued beating him until he fell down, and then stamped upon him, and left him lying upon deck. About three quarters of an hour afterwards, the men on the maintopsail yard heard mournful cries from the quarter-deck, and saw the captain beating Burr near the mizzen-mast. After the beating, Burr lay as if dead; and was lowered down into the forecabin by a rope. His face and head were bloody, and his mouth was filled with blood. The next day he spat blood, and was taken upon deck by order of the captain, placed upon a spar, and kept there throughout the

day in the rain and cold (it being early in April and bad weather), until two or three hours after dark, when he was again lowered into the forecastle. Sometime during that night he died, being found dead in his berth by the morning watch.

The district attorney then showed to the jury a piece of bamboo, upon which was fastened a sail-needle, projecting about three-fourths of an inch, and called several witnesses, who testified that the captain and mate were in the daily habit of pricking the deceased with this instrument, in the arms, legs, back, and thighs. The steward also testified, that one morning at breakfast, the captain said to the mate they might use up every rope in the ship on the d——d Frenchman, without beating any thing into him. After breakfast the mate brought down a piece of bamboo, saying that he would put *life* into Burr. They then took twine and needle, and made the pricker. After Burr's death his body was found badly marked by the needle and by cuts from ropes. He was thrown overboard the morning after his death, without any religious services. It also appeared that he had been kept at holystoning the decks, and that while so employed the captain amused himself by throwing buckets of water over him. And one witness being asked, if he ever saw Burr wet more than once, replied that he "hardly ever saw him dry."

The second mate said, "the Frenchman died of the same disease that the dog is dying of," pointing to the dog whose head was badly swelled by the use of the pricker; and asked the mate if he was not afraid that Burr's ghost would appear to him.

On the part of the defence, it was admitted that Burr had been beaten, and that the needle had been used upon him; but it was contended that the beating was justifiable, because Burr had neglected his duty at an emergency which admitted of no delay, and for which the instant infliction of

some punishment was necessary. As to the pricker, it was contended that although it was an "unusual" mode of punishment, it was not "cruel," being used merely as a spur is used to quicken the movements of a horse. The counsel also suggested the habit of sailors of shamming sick, by which officers become incredulous, and the fact that all the witnesses except one against the prisoners had been punished by them during the voyage; for which reason great allowance should be made for exaggeration. Witnesses were also produced, who testified that when Burr joined the vessel he appeared to have but a few days to live, and that the captain said he had the consumption. From this the counsel argued that his death came on by natural decline; and there being no exposure or punishment but what was justifiable and necessary, the prisoners were not answerable.

They also called several merchants, insurers, and masters of vessels to testify to Nichols's previous good character, and his respectable deportment while on shore; and it was stated that Couch was very poor, and had a mother and sister who depended upon him for their support.

Judge Story, in charging the jury, said, that in some material points he considered the prisoners' witnesses had confirmed the testimony of the witnesses for the government; and if the latter were to be believed, there could be no doubt that both counts in the indictment were made out, viz. first, for unjustifiably beating the deceased from "malice, hatred, and revenge;" and, secondly, for inflicting a cruel and unusual punishment with a sail-needle. He asked the jury if a single witness had contradicted the beatings, or the condition of the man before and after they were inflicted. Upon all these material points there was no conflict whatever. The use of the needle must be considered "cruel," if there was any meaning in the word, even when used upon the dog. His honor also doubted the right of an officer

to inflict punishment upon a man for not doing a seaman's duty, when he shipped only as cook, and professed no knowledge of seamanship. On alluding to the ill health of the deceased, his honor said that he was not a subject to be sent aloft in bad weather, but should have been kept in his berth. He also instructed the jury, that the captain must be considered as present in contemplation of law, aiding and abetting the mate in the infliction of the punishment, since he was within sight and hearing, and did not interfere.

The jury brought in a general verdict of guilty, recommending the mate to the clemency of the court, probably supposing that he had acted under the influence of the captain.

Before sentencing the prisoners, judge Story addressed them at considerable length, speaking of the offence as an extremely aggravated one, and telling them that they had every reason to be thankful they had not been indicted for manslaughter, as it was clear from the evidence, that they had pursued a course of deliberate cruelty toward the deceased, which, it would be impossible to deny, had, though unintentionally no doubt, accelerated his death; that the conduct of the deceased in imposing himself upon the captain as a cook, when he knew nothing of the business, was, to be sure, enough to create a feeling of hostility toward him, but that the punishment had been extreme and vindictive. Toward the close of his remarks, his honor confessed that he might labor under an infirmity on the side of mercy, in such cases as the present, as his boyhood had been passed among seamen of all grades, and he knew the trials, difficulties, and dangers which they had to pass through. The only excuse he could find for the prisoners, was their youth: the rashness of youth, the inconsiderateness of youth, and the pride of youth in command, demanded some allowance. Weight was also to be given to the testimony of the highly respectable witnesses, who deposed to the pre-

vious good character of Nichols, and his deportment when on shore. It having been stated that Couch was poor and had friends depending upon him, he was sentenced to thirty days imprisonment, and ten dollars fine; and Nichols to ninety days imprisonment and one hundred dollars fine. His honor, then saying that he wished to make their imprisonment as easy to them as possible, gave them their choice of jails, and they chose that in the town of Newburyport, which is their home.

As professional men, and considering this subject solely in its relation to law and to rules of practice, we have nothing to do with the public excitement and surprise, which the extraordinary lenity of this sentence produced. It is only because we feel that the court was led to exercise this extreme lenity, by principles and motives which must bear upon every case of a similar nature, and which therefore ought to be placed well before the profession, that we are induced to enter upon the consideration of them. Had this been the only case of the kind, it might be thought that there were peculiar circumstances governing it; but in the case of captain Winn before the same court, about a year previous, a similar sentence was pronounced, and upon the same reasons which are known to have governed the court in this case. Captain Winn was indicted under the same statute for imprisoning "from malice, hatred, and revenge" John B. Bassett, the chief mate of his ship, on a voyage to the Fejee islands. The following extract is from the *Law Reporter* of July, 1838. "It appeared that when the ship was near the Fejee islands, captain Winn took offence at something that the mate did, and ordered him below. Soon afterwards he ordered him to set the evening watch; but he refused to go upon deck, saying that he had been sent from duty with dishonor, and would not return to it unless honorably reinstated. Next morning captain Winn imprisoned him in his state-room, which was very small, and ordered

him to be kept on short allowance. He also ordered the skylight to be covered with lead ; and confined him in this situation about three months. His food was brought him but once in twenty-four hours, and at different times, sometimes in the morning, sometimes at evening, and sometimes not at all. The weather was so warm (it being in the tropics) that he was obliged to keep naked all the time, and then his distress for want of pure air was very great, and the vermin were extremely annoying. Several other circumstances were detailed by the mate respecting his imprisonment which were disgusting, and need not be stated here. He finally returned to duty, but having more trouble with the captain, was again confined in the same place three months." This confinement brought on a brain fever, from the effects of which it is thought the mate will never perfectly recover. Mr. Choate, counsel for the prisoner, declined arguing the case to the jury, and he was convicted. The learned judge, in passing sentence, spoke of the case as one of a very aggravated nature, but said that it was the first of which the prisoner had been known to have been guilty ; that there had been highly respectable witnesses to his good character when on shore, and that he had a wife and family depending upon him for support ; in consideration of which, he sentenced him to ninety days imprisonment, giving him the choice of jails ; and captain Winn, like the parties in the present case, passed his time in well furnished rooms, in the immediate neighborhood of his family, surrounded by every thing to make his imprisonment as easy as possible to him.

Each of these cases is stated by the court to have been very aggravated in its nature, covering the whole ground of the statute, and, as would naturally be supposed, requiring the full penalty of the statute ; yet in each the punishment has been extremely light, and for nearly the same reasons. It is to a respectful consideration of these reasons that the reader's attention is requested.

The first reason, stated by the court as having weighed with it in the present case thus virtually to wave the penalty of the statute, was *the youth of the parties*. We cannot but think, that this must have been a misapprehension on the part of the reporters. The court might have suggested their youth as a means of accounting for their act; but that his honor should have held that a man of twenty-five years of age, the father of a family, and old enough to have command of a ship, was too young to be fully answerable in law for an act of cruelty, it is impossible for us to believe. The period between the ages of seven and fourteen has been debatable ground, but we never heard before of its being extended to a quarter of a century. There are some passions to which youth is peculiarly liable; but we never supposed that deliberate and protracted cruelty was one of them. If a man of five and twenty is too young to suffer the full penalty upon a conviction for deliberate and aggravated cruelty, how much of the penalty is a man of thirty to suffer, and how old must a man be before he is to be fully answerable?

There is one appeal which is often made in behalf of masters of vessels when convicted of cruelty, which was made in this case, as also in that of captain Winn, and in fact has become so common, that it might be stereotyped for the benefit of all counsel who shall have occasion to appear in such cases;—that is, *the previous good character of the parties*.

To support this in the case of captain Nichols, no witnesses were brought who had known him at sea, in command, and *as captain*, but merely some of his school-fellows who had known him fifteen years before, and two or three merchants and others who had formed some acquaintance with him during the short intervals he had spent on shore between his voyages. Nearly the same course was pursued in the case of captain Winn, and with considerable effect.



And as there is danger of its becoming settled practice, it is worthy of consideration, how much it ought to weigh against the plain facts of a given case as found by a jury.

It is to be expected, that the master of a vessel, in the short intervals which he spends at home between his long voyages, when in the midst of family and friends both to please and to restrain him, and in his intercourse with the merchants and insurers upon whose good opinion he depends for his bread, would preserve a respectable appearance. It would be the strangest thing in the world, if he should show signs of cruelty or of a tyrannical disposition at such times. But the very same man, when far from all the restraints of friends and superiors and public opinion, possessed of despotic power, and with none to see or hear him but those who stand to him in the relation of slaves, may show himself a very fiend. It is not in nature that the man should be the same in the two situations. Evidence might as well be brought to show the character of the prisoner's brother and sister, from which to infer his own, as to allow the evidence of friends interested in his behalf, and who have known him only as a sojourner and a visiter, to weigh more than his own actions when his own master and in command. One might almost as well set up in extenuation of an act of murder the character of the criminal when a child in his cradle. There are many men, at whose disposal we would advise no one to put his life and limbs on a long and distant voyage, whose real characters are not even suspected by their friends at home. This is the very injustice of which sailors complain. They say that the captain comes into court with a retinue of friends and employers certifying to his good character when on shore, with a show of respectability, and an exertion of strong interest in his favor, while they come in alone, friendless, and hardly credited when under oath. And this they say, too, the captain knows well, and sometimes even taunts them with when they are in his power.

There is another appeal often made in behalf of the captain. It was made, and with effect, in the case of captain Winn, also in this case, and indeed, so far as we know, it is invariably made,—we mean the fact of the captain's being a poor man, and having a wife and family, or mother or sister, or some other near relative, depending upon him for support, and who would be deprived of the benefit of his labor by a long imprisonment. There is nothing of which seamen complain more than of the effect given by courts to this appeal; and as their complaint appears to be not without reason, it certainly deserves consideration.

If the statute had been made to prevent cruelty *in general*, the case of the sea captain might be put to the court as one calling for the exercise of its lenity, on account of its peculiar hardships. But the statute was made expressly to apply to sea captains and officers, and to them only. It says—"If any master or other officer of a vessel" shall be guilty of cruelty, he shall be punished, &c. Now masters and mates of merchant vessels were, when this statute was passed, are now, and probably always will be, poor men, and having either wives and families, parents, or near relations who would suffer by their imprisonment. Yet for these very men the statute was enacted; and if those circumstances, which must exist in the case of nearly every master and mate, can be urged upon the court as reasons for abating the force of a statute made expressly to apply to them, and under which they are found guilty, what will become of the statute? For we may venture to say, that there is not one master or mate of a merchant vessel in a thousand who could not make the same appeal, and make it in such a way as to excite the sympathy of the court for his friends. If a law is enacted to apply solely to a class of men who are poor, and support their families by their labor, their being poor and having families dependent upon them is a singular reason why the law should not take effect. Yet this is pre-

cisely the nature of the argument so often used. When the sailor complains to us of this, and says that the captain's punishment is commuted because he is poor and has friends dependent upon him, and that the question is never asked whether the sailor, who has been killed, or maimed, or whose spirit has been broken by cruelty, was not also poor, and had not also a mother or sister or friends to whom his small and hard earnings might have been a relief, we have no answer to make him; nor can we satisfy him by excusing this lenity to an oppressor, as a leaning to the side of humanity.

There is still another consideration, which is often urged upon the court as a motive for cutting down the penalty of the statute, and which is known to have had much weight with the bench in the late case; that is, *a want of confidence in the testimony of seamen*. The danger of crews combining against their officers, and the necessity there often is of making allowances for exaggeration, are well known; but we cannot be reconciled to making it a rule of court that seamen, as a class, are not to be believed. There is false swearing among all classes; and interested men are apt to exaggerate. In so serious a matter ought not each witness to stand on his own ground? We lately heard a distinguished lawyer, after about thirty years' constant dealing with juries and witnesses, state, as the result of his experience, a diminished confidence in the willingness of parties to tell the whole truth, but at the same time an increased confidence in evidence which has stood the test of a strict cross-examination. Now, seamen are a superstitious, and in a certain sense, we may even say, a religious, class of men, and capable of being impressed with a sense of the obligation of an oath, and a dread of the consequences of breaking it. But even if this were not the case, what should weigh still more in favor of their evidence, is, they are comparatively an ignorant, and certainly far from being

an artful class. If then a crew of such men agree in a consistent story, go through the ordeal of a searching cross-examination by counsel, whose habits of mind are logical in the extreme, and whose whole life has been spent in sifting evidence and in detecting combination and falsehood, (the prisoner having a right to demand, if there is any suspicion of a combination, that the witnesses be examined separately), and yet no contradictions are discovered, and nothing is brought out to justify a suspicion of a combination, ought their character, *as seamen*, so to taint their evidence, that though the jury may believe them, and bring the party in guilty, yet the penalty must be reduced to almost a nominal matter? In this late case, as we have already said, the crew agreed in telling a consistent story, and stood the test of the rigid cross-examinations (which might have been separate if the prisoners had wished) by the ablest of counsel; and his honor, in charging the jury, said that there was no conflict on the material points, but that, on the contrary, the very witnesses for the defence corroborated their testimony; the jury, too, believed them; and yet the court was in a great measure induced to cut down to almost nothing the penalty for an offence which it said covered the whole ground of the statute and more, from the general difficulty of knowing how much of a sailor's testimony to believe. Persuaded by these and other facts, that such is the conclusion to which our maritime court has come upon this subject, and which must of course operate very much like a rule of practice in similar cases, it will be wise in us to direct our attention for a moment to what we fear may be some of its consequences.

This sentence upon Nichols and Couch is already known far and wide among the masters, mates, seamen, landlords, and shipping masters of our city, and is the common topic in cabins and forecastles. By it masters and officers are confirmed in their notion that seamen are not to be believed

in courts of justice, and sailors are made to feel, that however aggravated may be the cruelty practised upon them, if there are none to testify to it but themselves, a conviction will be hardly worth procuring. Except intentional murder, a worse case than that of captain Nichols, attended by fewer mitigating circumstances, and supported by stronger evidence, will not be likely to occur. What slighter punishment there is left for a case less aggravated, we do not know.

Cruelty is rarely practised where there are passengers. They act as a restraint upon the captain;—there is something like public opinion; and he knows that they will be credible witnesses against him if he is brought to trial. It is on long voyages, to distant coasts, where there are none to see and hear but the crew themselves, that seamen need most the preventive protection of the law; and there it seems this law is most likely to fail them. Under such circumstances, and on this principle of construing seamen's testimony, there is no crime short of murder, which a captain may not commit without much fear of the result; and even that of murder would be difficult of proof. We may seem to speak strongly, but we believe, not beyond the truth.

We are far from wishing to diminish the supreme power of the captain on board his vessel. On the contrary, with some knowledge of what life on ship-board is, were we to be subject to that power all our days, we would not wish to have it diminished one iota. We are convinced that it is necessary, yet if public policy requires so great a power to be lodged in the hands of such a numerous and varying class as ship masters form, there is the more reason that the exercise of it should be carefully watched, and that those in whose hands it is placed be made strictly responsible. We know that every day upon the high seas the crews of vessels, in whose hands the physical force is, are kept from resistance by the consciousness that

there is a law which will call the captain to account when the voyage is up. But let this reliance upon the full execution of the law be weakened, (as it must be by this mode of receiving sailor's testimony, and this habit of reducing the punishment of the captain, from motives which we have considered), and we would not wish to have the consequences on our own head. The duty of the officer will not be made any easier, and the condition of the sailor will be much worse. It is not in human nature to bear the treatment which crews are often subject to—and which will not be improved by the course now pursued,—with a knowledge that any redress is slight and uncertain, but such as they may take into their own hands. The silent operation of this statute has sheathed many a knife, and quelled many a mutiny. The power of the captain, too, must be sustained, though the abuse of it may not be fully punished; and the case may occur, that the very courts, who exercise what we cannot but feel to be a mistaken lenity towards the captain, may be called upon to punish, perhaps with death, a man who would never have raised his own arm, had he been sure that the arm of the law was not shortened.

The foregoing are the principal causes which have been generally assigned for the lenity of this sentence. But there is yet another motive which we have reason to know operates strongly upon the mind of the court in these and similar cases, and which will be the last that we now propose to consider. In passing the sentences upon Nichols and Couch, and also upon Winn, a year since, we observed that judge Story laid much stress upon the confidence he felt, that an exercise of great lenity, and an appeal to the better feelings of the criminals, would effect more than any severe punishment; and in several of the reports of these cases we observed expressions like this: "such a course will answer the end of punishment (reformation)

better than the inflicting of the full penalty," &c. Now, although we do not believe that even prevention is the only end of punishment, but that revelation and the whole course of nature show retribution to be an essential part of the idea, yet surely the reformation of the individual criminal is a small part of the object of any statute. The statute in question was passed to prevent cruelty; and as a means of such prevention, has ordered the punishment of persons convicted. Now, though it is very possible, that waving the penalty and substituting an appeal to the better feelings of the guilty person may in some cases operate well upon the individual under trial, yet the statute and the manner of enforcing it were intended to act upon the whole class of men for whom it was made, and more especially upon the worst of that class—the violent, the hard-hearted, and the naturally cruel,—in the moment of passion,—at the moment when its protection is needed most by those who have no other protector. And who can doubt, that the hands of such men at such times will be stayed sooner by the fear of a full retribution, than by the prospect of a lenient sentence, and an address, however moving, from the judge on the bench. The law was intended to *prevent* crime, to prevent *first offences*; to act *in terrorem* when better feelings have ceased to act, and thus to protect the sailor from cruelty, and not merely to give him redress after it is inflicted; or, still less, merely to reform the perpetrator of the crime.

But even if the judge were convinced that lenity toward the offender would be the surest way of preventing the commission of the same crime by others, it appears to us to be a question quite worth the asking, whether he has any discretion to say that the ends of justice may be best reached by not inflicting the penalty. The statute says—"every person so offending shall on conviction be punished by fine not exceeding \$1000, or imprisonment not exceed-

ing five years, or by both, *according to the nature and aggravation of the offence;*" evidently giving the judge the discretion of adapting the punishment to the degree of the criminality of the act, and not to the probability of reforming the criminal, or to the judge's own opinion of the policy of inflicting the whole penalty incurred. If the offence is one of an aggravated kind, covering the whole ground of the statute, and more, without any mitigating circumstances in the act itself, is not the judge bound to inflict the full penalty, leaving commutation to the executive, whatever may be the prisoner's deportment at the trial, or his relation to third persons? Can the judge show lenity to such a criminal, even though he should seek it carefully with tears? In short, is not the judge's discretion to be exercised solely in determining from all the circumstances of the case, the degree of criminality of the party, and in modifying the punishment according to that degree of criminality, and not according to any opinion of his own of the probable consequences of such an infliction? If the penalty is wrong in general, the legislature must alter it; and if it works a hardship in a particular case, the executive must modify it.

We are aware that there may seem to be a degree of indecorum in thus freely discussing sentences passed by a judge of so exalted a reputation as he whom it is our good fortune to have presiding over our chief maritime court; yet as the principles developed in these sentences must deeply affect the condition of a large class of men, daily increasing in numbers and respectability; who, too, have few opportunities of making their voice heard before the public;—we have thought that among the various subjects discussed in the columns of a law journal, there is no one more deserving of the serious consideration of the profession, than that which we have thus imperfectly opened to its notice.

R. H. D. Jr.



## ART V.—AMERICAN REPORTS AND REPORTERS.

In this country, the decisions and opinions of the judicial tribunals have received more of the legislative sanction, than has been accorded to them in any other. In England, we believe, the business of reporting is entirely unofficial, and the authenticity of reported cases wholly dependent upon the character of the report and of the reporter. In other European states, and especially in France, collections of cases have been and are now published, but they do not seem to be regarded with that respect, with which the English and American lawyers are accustomed to look upon judicial opinions. In almost all the United States, the decisions of the higher courts are required by law to be reported, either by the judges or some of them, or by a reporter officially appointed and paid in part at least by the government; they are distributed at the public expense, in the same manner as the statute laws, besides being sold by the reporter on his own account; and the opinions of the judges are for the most part drawn up in writing. The reported cases are a series of elaborate legal essays, on the various subjects to which they happen to relate, drawn up with the knowledge and expectation that they are to be published, and to become an authoritative exposition of the law and its application. The decisions of our higher tribunals, therefore, which are reported and published in pursuance of some legislative provision, seem to be thereby invested with a sanction and authority, which the English reports have never enjoyed since the days of the year-books.

We have ventured, on a former occasion, to advance the opinion, that, since the first volume of *American Reports* was published, namely, within the last fifty years, no country has done so much in this department of juridical

literature, as the United States ; and the examination of the American reports, which we have gone through for the purpose of this notice, has convinced us of the entire truth of the remark.

In consideration of the great importance of a knowledge of this branch of our legal literature to members of the profession, we shall devote this article to a short bibliographical account of the American reports,<sup>1</sup> with brief notices of the statute provisions, where any exist, for the publication of the decisions of the courts. In pursuance of this design, we shall first mention those which contain the decisions of the United States courts, comprising the supreme court, the circuit courts, and the district courts. We shall next notice in chronological order (so far as that arrangement may be convenient) the reports of the decisions of the several state courts, commencing with Maine and following the order in which the states are usually mentioned.

Rhode Island has no reports, and we are not aware of the existence of any in the new states of Michigan and Arkansas. The judiciary systems of the different states have nearly all been modified, and some entirely changed in their organization, during the periods through which these reports extend ; so that there appears in the account of the reports a much greater variety of courts, than does now in fact exist or ever has existed at any one time. A history of the judiciary systems of the United States and of the several states, though an interesting subject, would extend this article to too great a length. In general, therefore, the names only of the different courts, in which the decisions were made, will be given. Of the comparative authority and value of the different reports, we shall not here attempt to speak. Many of the volumes have been noticed

<sup>1</sup> In this article, we have said nothing of the volumes of reports published in the British-American Provinces. All that have come to our knowledge are noticed in vol. xix. p. 246, and vol. xx. pp. 217, 394.

in former numbers of our journal at the time they were published.

UNITED STATES.

*Supreme Court.* The cases decided in this court, from its organization, February term, 1790, to August term, 1800, inclusive, were reported by Alexander James Dallas, and are contained in the second, third, and fourth volumes of his reports. The cases, subsequently decided, to February term, 1815, inclusive, were reported by William Cranch, and published in nine volumes. From February term, 1816, to January term, 1827, inclusive, the cases in this court were reported by Henry Wheaton, and occupy twelve volumes. On the resignation of Mr. Wheaton, the office of reporter was conferred upon Richard Peters, by whom it is now held. Mr. Peters has published thirteen volumes, containing the decisions of the supreme court to January term, 1839 inclusive. Mr. Peters also published in 1830-4, condensed reports of cases in the supreme court of the United States. These volumes contain condensed reports of all the cases in the second, third, and fourth of Dallas, the nine volumes of Cranch and the twelve volumes of Mr. Wheaton. In his preface, Mr. Peters says, "this work will contain all the cases adjudged in the supreme court of the United States from 1790 to 1827, inclusive, in a form which will make it authority in all judicial tribunals."

The decisions of the supreme court of the United States have been regularly reported, in an unbroken series, from the organization of the court; but the first provision, made by law, relating to the office of reporter, was contained in an act of congress, passed March 3, 1817, and limited to three years only. This statute recognised the power of the court to appoint a reporter; and provided that he should receive from the treasury of the United States, an

annual compensation of one thousand dollars, on the condition that the decisions should be printed and published, within six months after they were made; and also that eighty copies of the published reports should be delivered to the secretary of state, without any expense to the United States. This statute, by an act passed May 15, 1820, was continued in force for three years longer, and was then suffered to expire. A third statute was enacted February 22, 1827, expressly authorizing the court, from time to time, to appoint a reporter of its decisions, and establishing the salary of the office at one thousand dollars. This statute, in addition to the conditions imposed upon the reporter, by the statute of 1817, required him to sell his reports to the public at large, at a price not exceeding five dollars a volume. This act was also limited to three years, and of course expired in 1830. We believe, that there is now no statute in force, in reference to the office of reporter of the supreme court of the United States; but since the expiration of the last mentioned statute, an annual appropriation has been made for the reporter of a sum equal to the salary above mentioned.

*First circuit.* The decisions of this court, since the appointment of the Hon. Joseph Story, in November, 1811, have been regularly reported, viz.: from 1812, to 1815, inclusive, by John Gallison, in two volumes; from 1816, to 1830, inclusive, by William P. Mason, in five volumes; and from 1830, to 1837, by Charles Sumner, the present reporter of the court, in two volumes.

*Second circuit.* The cases, decided in the circuit court for the second circuit, from 1810 to 1826, have been reported and were published in 1827 by Elijah Paine, jr., in one volume.

*Third circuit.* The second, third and fourth volumes of Mr. Dallas's reports contain cases decided in this court, from the April term, 1792, to October term, 1806, inclusive.

The decisions from 1803 to 1827 were reported by Bushrod Washington, one of the justices of the supreme court of the United States, and published in four volumes, under the editorial supervision of Richard Peters, jr. The last named gentleman has also reported cases decided in this court from 1803 to 1818, in one volume. The decisions from October term, 1829, to April term, 1833, inclusive, have been reported by Mr. Justice Baldwin, in one volume.

In 1801, John B. Wallace published a small volume of cases adjudged in the circuit court of the United States for the third circuit. It includes the cases of the May sessions, 1801, and was intended as the commencement of a series of reports in this court,<sup>1</sup> as organized under the act of 1801, chapter 75. But the court being abolished by act of 1802, chapter 31, repealing the former act, Mr. Wallace was compelled to abandon his plan. A second edition of this work was published in 1838, which includes two cases not in the former edition—one decided in October, 1801, the other in January, 1802.

*Fourth circuit.* The decisions of the Hon. John Marshall, late chief justice of the supreme court of the United States, during the time he presided in the circuit court for the fourth circuit, embracing the cases decided therein from 1802 to 1832, have been published from his manuscripts, since his death, by John M. Brockenbrough, in two volumes. Mr. Brockenbrough has included in these volumes two cases, republished from the sixth volume of Call's reports, for the purpose of preserving an unbroken series of the decisions of the late chief justice, in the circuit court, and also two cases, which have been decided since the decease of the chief justice, by his successor, Mr. Justice Barbour, in November 1835 and May 1836.

<sup>1</sup> The judges constituting this court during its existence were William Tilghman, of Pennsylvania, chief judge—Richard Bassett, of Delaware, and William Griffith, of New Jersey.

*District of New York.* The Hon. William P. Van Ness, judge of the district court for New York, published in 1814 a small volume of prize cases decided in this court.

*District of Pennsylvania.* Richard Peters, jr. published two volumes of admiralty decisions made in the Pennsylvania district from 1792 to 1807, to which are added some cases determined in other districts, with learned notes and appendices.

*Eastern district of Pennsylvania.* The cases adjudged by the Hon. Joseph Hopkinson in this district from November term, 1828, to February term, 1836, inclusive, have been published in one volume by Henry D. Gilpin.

*District of South Carolina.* Mr. Justice Bee published in 1810 a volume of admiralty decisions made in this court from the year 1792 to 1805; to which is added an appendix containing decisions in the admiralty court of Pennsylvania, and some cases in other districts of the United States.

We believe that no provision has been made by law for the publication of the reports of either the circuit or district courts of the United States, but that all these reports have been the results of individual enterprise.

#### MAINE.

The legislature of this state, by a statute passed June 24, 1820, (which was at first temporary, but afterwards made perpetual) provided for the appointment by the governor of a reporter of the decisions of the supreme judicial court, with a salary of six hundred dollars a year. Simon Greenleaf received the first appointment under this statute. Mr. Greenleaf's cases commence with the first decisions of the supreme judicial court in Maine, for the county of York, August term, 1820, and, extending through a period of twelve years, terminate with the July term for the county

of Waldo, 1832. They are contained in nine volumes; the last of which is in part made up of an admirable digest, by Mr. Greenleaf himself, of all the cases reported by him.

Mr. Greenleaf was succeeded in his office of reporter, by John Fairfield, who commenced with the April term, 1833, for the county of Cumberland, and ended his labors, as reporter, with the July term, in Waldo county, 1835. His cases make three volumes. Mr. Fairfield having been elected to congress, the office of reporter was conferred upon George Washington Pierce, who died without having entered upon the discharge of its duties. Mr. Pierce was succeeded by John Shepley, who has published two volumes of cases from April term, 1836, for York county, to May term, 1837, for Kennebec, inclusive. By a resolve of the legislature, passed in 1836, each volume subsequent to the third volume of Fairfield's reports, shall be entitled and lettered upon the back thereof "Maine Reports" and the first volume subsequent to the third of Fairfield's, shall be numbered the thirteenth volume of Maine reports.

#### NEW HAMPSHIRE.

The supreme judicial court of New Hampshire was authorized, by an act of the legislature, passed June 26, 1815, to appoint a reporter whose duty it should be to obtain and publish annually authentic reports of its decisions. This law was repealed, December 18, 1816, and the business of reporting was left to the inclination and interest of private individuals. Nathaniel Adams reported the cases from September, 1816, to February, 1819, in one volume, making the first volume of the New Hampshire reports. Levi Woodbury and William Richardson reported the cases from February, 1819, to May, 1823, inclusive; and William Richardson, chief justice, reported the cases from Septem-

ber, 1823, to January, 1832, making the third, fourth and fifth volumes of the New Hampshire reports. The reports are continued under the direction of the supreme court, and already amount to seven volumes, cited as the New Hampshire reports. The first part of the eighth volume already published contains the cases to July term, 1836, inclusive.<sup>1</sup>

#### VERMONT.

The supreme court of Vermont was established by an act of the general assembly, passed in February, 1779. In 1793, Nathaniel Chipman, chief justice of the supreme court, published a small volume of reports, comprising a period from 1789 to 1791, inclusive. In 1809—10, Royall Tyler, chief justice, published two volumes of reports comprising cases decided in the supreme court during 1801—2—3. In 1821, William Brayton published a volume of reports, being a collection of numerous cases decided in the supreme court, during the years 1815—1819, alphabetically digested under proper heads.

By an act of the legislature, passed October 28, 1823, the governor was directed, by and with the advice of the council, to appoint a reporter of the decisions of the supreme court of judicature, whose duty it should be to obtain true and authentic reports of the decisions of said court and publish the same annually. His salary was fixed at four hundred dollars a year, with the profits of publication. Daniel Chipman was appointed the first reporter under this act. His reports, published in one volume, in 1824, consist of select cases from Nathaniel Chipman's reports, of cases decided in the supreme court previous to 1813, and

<sup>1</sup> Timothy Farrar, counsellor at law, reported the case of the Trustees of Dartmouth college against William H. Woodward, argued and determined in the supreme court of judicature of the state of New Hampshire, November, 1817, and on error, in the supreme court of the United States, February, 1819.



of cases subsequently decided in course, down to 1825, inclusive. This volume contains a brief historic sketch of American jurisprudence, and of the judicial system of Vermont.

In the year 1825, the reporter's salary was increased by law to six hundred dollars a year and the profits of publication, provided he should faithfully attend the supreme court, in person, at their sessions in the several counties, for the purpose of learning their decisions. Asa Aikin succeeded Mr. Chipman as reporter. His reports, in two volumes, consist of cases argued and determined in the supreme court, during the judicial year, from October, 1826, to October, 1827, together with some cases previously determined.

By an act passed November 13, 1827, it was made the duty of the justices of the supreme court, to make true and authentic reports of all decisions made by said court proper to be reported, as soon as might be, after such decisions should be made; and on or before the first day of October, in each year, to furnish a true and correct copy of the same to the secretary of state, subject to the order of the general assembly:—and the salary of each justice was increased by the sum of one hundred and twenty-five dollars a year; and all former laws on this subject were repealed.

In 1828, the governor was authorized by law to appoint some suitable person to prepare and procure to be printed, as soon as might be, five hundred copies of the reports of cases decided in the supreme court, during the judicial year ending October 1st, 1828. These reports were to be sold by the secretary at cost. The reporter's salary was left at the discretion of the general assembly. By an act passed October 29, 1829, the governor was authorized to make a similar appointment annually.

The Vermont judges' reports, beginning December term,

1826, and coming down to February term, 1837, are contained in nine volumes cited as the Vermont Reports. By an act passed November 1, 1837, a reporter is to be appointed annually by the assembly, whose duty it is to make and faithfully digest and prepare for publication, authentic reports of the cases decided and not yet reported, and all cases that hereafter may be decided. His salary is fixed at seven hundred dollars a year and the profits of the work, provided he shall furnish fifty copies for the use of the state, and one copy for each organized town in the state, at the actual cost of publication.

Mr. Shaw has been appointed reporter under this act.

#### MASSACHUSETTS.

The legislature of Massachusetts, by an act passed March 8, 1803, authorized the appointment by the governor of a reporter of the decisions of the supreme judicial court. This act was limited to the term of three years, but was continued from time to time, and made perpetual by an act passed February 2, 1815. The salary of the reporter was fixed by the first statute, and has ever since remained, at the sum of one thousand dollars a year; which sum, with the profits arising from the publication of his reports, is declared to be in full compensation of his services.

Ephraim Williams received the first appointment of reporter, and performed the duties of that office for one year. The reports, published by him, commence with the September term, 1804, in Berkshire, and terminate with the June term, 1805, in Hancock, and fill one volume.

Mr. Williams then resigned, and was succeeded by Dudley Atkins Tyng; who commenced his labors as reporter, with the March term, 1806, in Suffolk, and continued to perform the duties of his office for sixteen successive years.

Mr. Tyng's cases end with March term, 1822, in Suffolk and Nantucket, and fill sixteen volumes.

On the resignation of Mr. Tyng, the office of reporter was conferred upon Octavius Pickering, by whom its duties were performed till August 1839, when he resigned. His successor has not yet been appointed. Mr. Pickering's cases begin with the September term, in Berkshire, 1822, and his seventeenth volume includes the cases down to March term, 1836.

By a statute of April 12, 1838, it was enacted, that the reports of the decisions of the supreme judicial court on all questions of law argued and determined before the first day of September, in each year, should be published on or before that day. Accordingly the cases from the March term, in Suffolk and Nantucket, to the October term, in Worcester and Middlesex, for 1838, have been published and constitute the twentieth and the first part of the twenty-first volume of Pickering's reports. The eighteenth and nineteenth have not yet been published.

The reports published by Messrs. Williams and Tyng are known and cited as the Massachusetts reports. Those of Mr. Pickering are referred to by the name of the reporter.

#### CONNECTICUT.

An act passed in 1785 required the judges of the supreme court to render written reasons for their decisions, in cases where the proceedings terminated in an issue at law. Ephraim Kirby reported in one volume the cases adjudged in the superior court from May, 1785, to May, 1788, with some judgments in the supreme court of errors. Jesse Root, a judge of the superior court, reported the cases adjudged in the superior court, and supreme court of errors, from July, 1789, to 1798, taken from minutes made for private use, with a variety of cases anterior to

that period. These reports, in two volumes, are accompanied with valuable observations upon many adjudged points and rules of practice, and upon the government and laws of Connecticut, designed to render the system of its jurisprudence, clear, consistent and stable.

Thomas Day reported in five volumes cases adjudged in the supreme court of errors, with some decisions in the circuit court of the United States, for the district of Connecticut, from 1802, to 1810, inclusive, which are cited as Day's reports. By the revised statutes of 1821, the judges of the supreme court of errors are required to assign publicly the reasons of their judgments; and are authorized to appoint annually a reporter of their decisions, to receive such compensation as the general assembly should from time to time direct. His salary has been fixed at three hundred and fifty dollars a year. Thomas Day, reporter under this act, has reported the cases adjudged in the superior court of errors from June, 1814, down to the present time, in twelve volumes, cited as Connecticut reports.

To the first volume of Connecticut reports, there is prefixed a very interesting history of the judiciary of Connecticut, from the earliest times of the colony, from which it appears, that Mr. Kirby's were the first American reports ever published.

#### NEW YORK.

Coleman's Cases were the first reports published in this state. This volume contains cases of practice in the supreme court, from April term, 1794, to October term, 1800, by William Coleman. A second edition was published in 1808 entitled Coleman and Caines's cases, consisting of Coleman's cases which terminate in October, 1800, and of cases of practice from 1803 to 1805, selected from Caines's reports. The first statute provision for the publi-

cation of the reports was made April 7, 1804. This provision has been changed from time to time by subsequent legislation.

By the existing statutes, there are two reporters, one, of the decisions of the supreme court, and of the decisions of the court for the trial of impeachments and the correction of errors, called the state reporter, the other, of the decisions of the court of chancery, called the chancery reporter, with a salary of five hundred dollars each. By the statutes, it is made the duty of the state reporter to furnish at his own expense, one copy of each successive volume of the reports published by him, to the several clerks of the supreme court, and to the register and assistant register of the court of chancery for the use of those courts, and also to the secretary of state so many copies as shall be sufficient to supply the several courts of common pleas in the state with one copy each.

George Caines was the first reporter under the original act. He published three volumes bearing the title of New York term reports, containing cases in the supreme court, from May term, 1803, to November term, 1805, inclusive, which are cited as Caines's reports. Mr. Caines also published two volumes of cases in the court for the trial of impeachments and correction of errors, decided at Albany in the February terms for 1804 and 1805, to which are added some old decisions both in that and the supreme court. These volumes are cited as Caines's Cases in Error.

Mr. Caines was succeeded in the office of reporter by William Johnson, who published three series of reports, namely, three volumes in 1808, 1810, and 1812, of cases adjudged in the supreme court of judicature, together with cases determined in the court for the correction of errors, from January term, 1799, to January term, 1803, both inclusive, cited as Johnson's cases. These volumes, it will be seen, contain the cases nearly up to the time of Caines's

reports. Mr. Johnson published twenty volumes of reports of cases in the same courts, commencing with the February term, 1806, of both courts, and ending with January term, 1823, of the supreme court, and with the February term, 1823, of the court of errors. The cases in the latter court are in the latter part of the different volumes. They are cited as Johnson's reports.

By an act of April, 1814, it was made "the duty of the reporter, from time to time, to publish such decisions of the court of chancery, as the chancellor of the state shall deem of sufficient importance to be reported and published." In compliance with this direction, Mr. Johnson published seven volumes of chancery reports containing the cases from March, 1814, to July, 1823, both inclusive.

Mr. Johnson was succeeded as state reporter by Esek Cowen, who reported the cases in the supreme court and court of errors from May term, 1823, of the supreme court, and from April term, 1823, of the court of errors, to August term, 1828, of the supreme court, and to December term, 1827, of the court of errors. Mr. Cowen was succeeded as state reporter by John L. Wendell, the present reporter, whose reports commence with May term, 1828, of the supreme court, and with the December term, 1828, of the court of errors. His eighteenth volume contains the cases in the court of errors to December term, 1837. And the nineteenth, recently published, contains a part of the cases in the July term, 1838, with some subsequent cases, to May, 1839, in the supreme court.

Mr. Johnson was succeeded as chancery reporter by Samuel M. Hopkins, who published, in 1827, one volume of chancery reports, containing the cases in the court of chancery, from September, 1823, to January, 1826. Mr. Hopkins was succeeded as chancery reporter by Alonzo C. Paige, the present reporter, whose reports commence in April, 1828, on the accession of chancellor Walworth. His

sixth volume, published in 1838, contains the cases decided in August, 1837.

In addition to these series, which were published under the direction of the legislature, several other volumes have been published, on individual responsibility. In 1811, Mr. Yates published a volume of select cases. In 1820, John Anthon published a volume of cases determined at nisi prius (in the supreme court), from 1808 to 1818, with notes and commentaries on each case.

From 1817 to 1821, Daniel Rogers published six volumes of the New York City Hall Recorder—containing reports of the most interesting trials and decisions in the various courts of judicature for the trial of jury causes in the hall—during the years 1816—1821, both inclusive; to the last volume of which are added, notes of criminal cases from the reports of New York, New Hampshire, Massachusetts and Pennsylvania. This work is usually bound in two or three volumes. In 1823, Mr. Wheeler published three volumes of criminal cases decided in New York and elsewhere.

In 1831 and 1833, Jonathan Prescott Hall published two volumes of cases argued and determined in the superior court of the city of New York—containing the cases from August term, 1828, to December term, 1829, both inclusive. It is understood that these reports are to be continued. In 1833 and 1837, Charles Edwards published two volumes of reports of chancery cases decided in the first circuit of the state of New York by the honorable William T. McCoun, vice-chancellor. These volumes contain the cases from May, 1831, to November, 1836.

#### NEW JERSEY.

The first act providing for the publication of the reports in this state was passed March 12, 1806. By this act, the reporter was to be appointed annually by the joint ballot of the council and assembly of the state. This act further

provides, that the reporter "shall collect and compile in regular order all such cases as shall be adjudicated in the supreme court, with the opinions of the justices of the said court thereon, as shall arise on causes removed from the several courts for the trial of small causes in the several counties, by certiorari, as he shall think will tend to promulgate useful information to the citizens of the state; and also to collect and compile as aforesaid the causes on all other important and intricate subjects, with the opinions of the justices of the said court thereon; and to furnish the printer of the state laws with such cases and opinions, regularly digested, with a proper index to the same, yearly; and it shall be the duty of the said printer, to print the same with the said laws at the end thereof."

By an act of March 1, 1820, the term of office of the state reporter was extended to five years. By the same act, the salary of the reporter was fixed at \$250 for that year. For the two subsequent years, it was \$200 a year.

Richard S. Coxe published in 1816 a volume of decided cases from April term, 1790, to November term, 1795, inclusive.

Mr. W. S. Pennington, one of the judges of the supreme court, published in two volumes the decisions of the supreme court, from May term, 1806, to September term, 1813. These volumes are made up of the cases published annually with the laws of the state, by the provisions of the above mentioned act of 1806.

In February, 1818, Samuel L. Southard, one of the justices of the supreme court, was appointed reporter, and reported the cases from February term, 1816, to May term, 1820, inclusive, in two volumes.

In November, 1821, William Halstead, jr., succeeded Mr. Southard as state reporter. His reports, in seven volumes, contain the cases from November term, 1821, to September, 1831, inclusive. A part of the first volume is made up of



cases decided from April term, 1796, to September term, 1799, being a continuation of the cases in Mr. Coxe's reports. In the appendix to this volume are printed the original ordinances constituting the justices' courts, courts of common pleas and the supreme court. James S. Green succeeded Mr. Halstead as reporter in 1831. His reports, in three volumes, contain the cases from November term of that year to the end of November term, 1836.

By an act passed March 13, 1832, the appointment of a chancery reporter was authorized, to hold his office for five years, and to report the cases in chancery, the prerogative court, and the court of appeals. These reports are printed annually by the state.

Mr. Green was succeeded by Josiah Harrison, the present law reporter.

#### PENNSYLVANIA.

The earliest reports in this state are those of Alexander J. Dallas, in four volumes.

The first, published in 1790, contains cases in the supreme court, court of oyer and terminer, court of common pleas, and the high court of errors, between September, 1754, and December, 1789. The second volume includes cases in the federal court of appeals, in 1781, 1783, and 1787; in the high court of errors and appeals in 1792, 1795; supreme court of Pennsylvania, in 1766, 1781, 1786, 1788, (being a few detached cases) and from 1789 to December term, 1797 inclusive; in the common pleas of Pennsylvania, from August to December, 1790, inclusive; in the supreme court of the United States, from April, 1790, to August term, 1793, inclusive; and in the circuit court of the United States from April, 1792, to April term, 1798.

The third and fourth volumes include cases in the supreme court of the United States, from February term, 1794, to August term, 1800, in the supreme court of Pennsylvania

from 1797 to 1806, with some cases in the circuit court of the United States, and the court of errors and appeals of Pennsylvania and of Delaware. The last volume was published in 1807.

In the year 1800, Alexander Addison, president of the courts of common pleas of the fifth circuit, published a volume of reports of cases in these courts and in the high court of errors and appeals. The cases in the common pleas are from 1791 to 1799 inclusive; those in the court of errors and appeals were decided in 1793 and 1797. There are bound in the same volume, twenty-seven charges to grand juries delivered by Mr. Addison.

In 1817, 1818, and 1819, Charles Smith published four volumes of reports, from the manuscripts of the honorable Jasper Yeates, one of the justices of the supreme court of Pennsylvania, who had prepared them for the press. In the first volume, there are a few cases contained in Dallas's reports. These volumes contain cases decided in the supreme court from 1791 to 1808, inclusive, with some select cases *at nisi prius*, and in the circuit courts. They are cited as Yeates's reports.

From 1809 to 1815, Horace Binney published six volumes of reports containing the decisions of the supreme court from 1799 to 1814. To some of these volumes are appended cases decided in the high court of errors and appeals, and in the court of common pleas.

In 1811 and 1813, Peter A. Browne published two volumes of cases adjudged in the court of common pleas of the first judicial district (for the city and county of Philadelphia), from 1806 to 1814, inclusive. The second volume also contains an admiralty case in the district court of the United States and the rules of practice, in the first circuit court in Pennsylvania.

During the years from 1818 to 1829, Thomas Sergeant and William Rawle, jr. published the cases adjudged in the

supreme court of Pennsylvania, commencing in 1814, when Mr. Binney's reports ceased, and continuing till September term, 1828. These reports constitute seventeen volumes. William Rawle continued to report the decisions of the supreme court for the eastern district, from December term, 1828, to April, 1835. His reports are contained in five volumes. The reports for the eastern district are continued by Thomas J. Wharton, the present reporter, whose fourth volume, recently published, contains the decisions of the March term, 1839. In the middle, southern, and western districts, the cases from 1829 to June term, 1832, were reported by William Rawle, Charles B. Penrose and Frederick Watts, and are cited as Pennsylvania reports. Since 1832, the cases in the supreme court, except those in the eastern district, have been reported by Frederick Watts, the present reporter, in seven volumes, the last containing the cases decided at Pittsburgh, September term, 1838.

In 1831, John W. Ashmead published a volume of cases adjudged in the courts of common pleas, quarter sessions, oyer and terminer, and orphan's court of the first judicial district of Pennsylvania; and, in 1836, John Miles published a volume of cases decided in the district court for the city and county of Philadelphia, from March, 1835, to September, 1836, with some cases previous to March, 1835.

We believe that all the reports of this state are the result of individual enterprise; no statute regulations existing in relation to the publication of the decisions of the courts.

#### DELAWARE.

The amended constitution, so far as relates to the judicial department, went into operation in January, 1832. By an act of February 22, 1837, it is made the duty of the judge of the superior court residing in Kent county, to prepare reports of the decisions of the superior court, court of oyer and terminer, and court of errors and appeals; and, in con-

sideration of this increased duty, his salary was increased two hundred dollars a year. Samuel L. Harrington, associate justice, of Kent county, has published one volume, containing the cases, from the spring sessions in 1832, to June term, 1835, inclusive.

#### MARYLAND.

The earliest reports in this state are the four volumes of Thomas Harris and John M'Henry, sometimes cited as Maryland reports. These volumes contain a series of cases decided in the provincial court, and court of appeals of the then province of Maryland, from the year 1700 to the American revolution, and in the general court and court of appeals of the state of Maryland, from May, 1780, to December, 1799, inclusive. These volumes were followed by the reports of Thomas Harris and Reverdy Johnson, whose first volume contains the decisions of the general court and court of appeals, from the year 1800 to 1805, inclusive; the remaining six volumes contain the decisions of the court of appeals, (the general court having been abolished) down to 1826. These reports were succeeded by the two volumes of Thomas Harris and Richard W. Gill, containing the decisions of the same court, from 1826 to 1829. From 1829 to the present time, the cases decided in the court of appeals have been reported by Richard W. Gill and John Johnson. The eighth and last volume contains the cases to June, 1836.

The reports of cases decided in the high court of chancery of Maryland, in one volume, by Theodoric Bland, chancellor, were published in 1836. This volume contains the cases from the accession of chancellor Bland, in 1824, to 1829. No provision has been made by law for the publication of the reports—which consequently has been left to individual enterprise.

## VIRGINIA.

The first volume of reports published in this state was a folio published in 1795, by George Wythe, including cases from 1790 to 1795, and containing some of judge Wythe's own decisions, as judge of the high court of chancery of Virginia, with remarks on the decrees of the court of appeals, reversing some of those decisions.<sup>1</sup>

In 1798, Bushrod Washington published two volumes of reports of cases argued and determined in the court of appeals of Virginia, from 1790 to 1796, inclusive. A second edition, very much improved, was published in 1823.

Daniel Call published in 1801—1803 three volumes of cases in the court of appeals, from 1797, to May, 1803, with some cases in the third volume decided in 1790. These were followed by three volumes, not published until 1833, containing scattering cases from 1799 to 1803, then a regular series from April, 1804 to 1806, and then scattering cases again to 1818. The sixth volume also contains five cases decided in the United States circuit court for Virginia.

From 1809 to 1811, William W. Hening and William Munford published four volumes of cases in the supreme court of appeals from October, 1806, to October, 1809, inclusive, with select cases relating chiefly to practice in the court of chancery for Richmond district. William Munford continued to report the cases in the same court from March, 1810, to April, 1820, in six volumes.

Hitherto the reports had resulted from unofficial enterprise and industry alone; but, by a statute of 1820, amended by statutes of 1821 and 1829, the court of appeals was required to appoint a reporter, who should publish such decisions as any one judge might think worth reporting, for which he

<sup>1</sup> From 1788 to 1801, original chancery jurisdiction was confined to the county courts, and to one "high court of chancery" reaching over the whole state. Of this court, while it lasted, Mr. Wythe was judge or chancellor.

receives a compensation of eighty-three and a third cents for every hundred pages contained in each copy. By the statute of 1829, the reporter is directed to secure the copy-right to the commonwealth, and he and all other persons are prohibited from publishing more than seven hundred copies. Francis W. Gilmer was the first reporter appointed under the original act. He published only one volume of cases decided in the court of appeals from April 10, 1820, to June 28, 1821, sometimes cited as Virginia reports. Mr. Gilmer was succeeded by Peyton Randolph, who reported the cases in the same court, from November, 1821, to December, 1828, in six volumes. With the fifth volume of Randolph's reports, commencing in November, 1826, the decisions of the general court, which had been separately published (see below), began to be inserted in the same volumes with those of the court of appeals; a plan which is yet continued. Mr. Randolph was succeeded by Benjamin Watkins Leigh, whose reports in the court of appeals commence in January, 1829, and in the general court in June, 1829, and are continued to the present time. The eighth volume recently published contains the cases in the court of appeals including August term, 1837, and in the general court including December term, 1837.

In 1829, there was published a volume of cases determined in the general court of Virginia, from 1730 to 1740, and from 1768 to 1772. This volume was published by the legatee of Thomas Jefferson's manuscript papers. The cases during the former period were taken by Mr. Jefferson from manuscript reports of Messrs. Barradall and Hopkins, eminent colonial lawyers. During the latter period, they were made by Mr. Jefferson from his own notes, taken while he practised in the general court. In 1815, a volume of cases decided by the general court, commencing in the year 1789, and ending in 1814, was published by judges Brockenbrough and Holmes. A second volume containing the cases in the

same court, from 1815 to 1826, was published in 1826 by William Brockenbrough one of the judges of that court. Since 1826, the cases in the general court have been reported with those in the court of appeals. These two volumes are cited as Virginia cases.

#### NORTH CAROLINA.

The first reported cases in this state were published by Francis Xavier Martin, in a small volume bound up with his translation of Latch's cases ; they are entitled notes of a few decisions in the superior courts of the state of North Carolina, and in the circuit courts of the United States, for North Carolina district, and are cited as Martin's reports.

John Haywood published two volumes of reports of cases in the superior courts of law and equity, from 1789 to 1806.

In 1802, John Louis Taylor, one of the judges of North Carolina, published a volume of cases in the courts of law and equity, from 1799 to 1802, cited as Taylor's reports. In 1818, he published a second volume of cases, from July term, 1816, to January term, 1818, inclusive, usually cited as North Carolina term reports. This volume is sometimes bound and lettered as the third Law Repository, and so cited. In 1805, Duncan Cameron and William Norwood published a volume of cases determined by the court of conference, from 1800 to 1804, cited as Conference reports. In 1805, the name and style of the "court of conference" was altered to that of the "supreme court of North Carolina." Archibald D. Murphy, one of the judges, published three volumes of cases in the supreme court, from 1804 to 1819, inclusive.

The Carolina Law Repository, begun in March, 1813, and published semi-annually, to September, 1816, besides several miscellaneous articles, contains reports of cases adjudged in the supreme court, from July term, 1811, to July term, 1816, inclusive, by John L. Taylor, chief justice of

the supreme court. This work is bound in two volumes, and cited as the Carolina law repository.

The cases in the supreme court, from June term, 1820, to June term, 1826, inclusive, were reported by Francis L. Hawks, in four volumes, except the first two hundred and forty-eight pages of the first volume, which were reported by Thomas Ruffin. They are however all cited as Hawks's reports.

Thomas P. Devereux continued the reports of cases at law from December term, 1826, to June term, 1834, inclusive, in four volumes. From December term, 1834, to June term, 1836, inclusive, the cases at law in the supreme court were reported in one volume by Thomas P. Devereux and William H. Battle. Mr. Devereux has recently resigned. The equity cases determined in the same court from December term, 1826, to June term, 1834, were reported in two volumes by Thomas P. Devereux, and are cited as Devereux's equity reports.

By statutes of 1818, -21, -22, -31, and a resolve of 1835, the office of state reporter was established, to be appointed annually, with a salary of three hundred dollars a year and the profits arising from the sale of the reports, except one hundred and one copies to be printed at the expense of the state for the use of the state.

#### SOUTH CAROLINA.

The earliest reports in this state are the two volumes of Elihu Hall Bay, one of the judges of South Carolina, published in 1809—11. The first volume contains cases in the superior courts of law, from 1783 to 1795, inclusive. The second consists of decisions made in the constitutional court on appeals from the common law tribunals from the year 1796 to 1804, inclusive.

The next in point of time were the four volumes of



chancellor Henry W. Dessaussure, published in 1817-19; being cases in the court of chancery from the revolution to December 1813, inclusive, cited as equity reports.

The decisions in the constitutional court, during the years 1812-16, inclusive, were published in 1823 in two volumes, sometimes cited as South Carolina reports. These were followed by two volumes of constitutional reports published in 1819, containing the decisions of the constitutional court in 1817.

The cases in the constitutional court, from 1817 to 1820, were reported in two volumes, by Henry L. Nott and Daniel J. McCord, published in 1820-21, and the cases in the same court from 1821, to May term, 1823, were reported in the first two volumes of Mr. McCord. The cases in 1823-4 were reported in the two volumes of constitutional reports, new series. William Harper, then state reporter, now one of the chancellors in equity, published in 1824 a volume of cases at law, decided in the constitutional court, from November term, 1823, to November term, 1824, inclusive, and in 1825, Mr. Harper published a volume of equity cases, decided in the court of appeals in the year 1824. Since that time, the reports of cases at law have been continued in the third and fourth volumes of McCord's reports, containing cases in the court of appeals from February term, 1820, to April term, 1828, and in the two volumes of H. Bailey, state reporter, containing the cases from May term, 1828, to January, 1832, inclusive; and from January term, 1833, to June term, 1835, inclusive, in the two volumes of W. R. Hill, state reporter.

The chancery cases in the court of appeals, from January term, 1825, to May term, 1827, are reported in the two volumes of chancery reports, by Daniel J. McCord, state reporter. The state reporter has a salary of fifteen hundred dollars a year.

In December, 1835, the old court of appeals was abol-

ished, and the present court of appeals constituted as follows, by an act which provides, that "the law judges and chancellors shall meet and sit for the purpose of holding the court of appeals, twice a year at Columbia, and twice a year at Charleston."

The reports in the constitutional court by the late judge Brevard, in two volumes, include the cases from the establishment of that court, to the year 1812. The first volume has been already published, and contains the cases to May term, 1805, inclusive, and the second volume is either already published or will soon appear.

#### GEORGIA.

Three volumes of reports have been published in this state, viz.: 1. Reports of the decisions of the superior courts by judge Thomas U. P. Charlton, published in 1824, containing cases decided previous to 1810.

2. Reports of decisions made by the judges of the superior courts of law and chancery, by George M. Dudley, published in 1837, containing decisions from July term, 1831, to July, 1833, inclusive.

3. Reports of decisions made in the superior courts of the eastern district of Georgia, and in the middle circuit, by Robert M. Charlton, late judge of the superior court of the eastern district, published in 1838, and containing decisions from January term, 1811, to July term, 1837.

There is no provision made by law, in this state, for the publication of the decisions of the courts.

#### ALABAMA.

The legislature of this state, by an act of January 15, 1828, authorized the supreme court to appoint a reporter with a salary of \$500 a year, and the profits arising from the sale of his reports, provided he should furnish the state with seventy-five copies at his own expense. By subse-

quent statutes, provision was made for publishing the decisions from the organization of the court. Henry Minor, state reporter, in 1829, published a volume of cases decided from 1820 to July, 1826, cited as Alabama reports. He was succeeded by George N. Stewart, who published in three volumes the decisions from the year 1827 to January term, 1831, inclusive. Mr. Stewart was succeeded in 1834, as reporter, by Benjamin F. Porter, who published from the manuscripts of his predecessor five volumes of cases, decided from January term, 1831, to January term, 1834. These volumes are cited as Stewart and Porter's reports. Since 1834, Mr. Porter has continued to report the decisions of the supreme court. His sixth volume contains the decisions of January term, 1838. The seventh volume, now in press, will be published in a few days.

#### MISSISSIPPI.

The first reports of this state were published in 1834, by R. I. Walker, state reporter, in one volume, which contains the cases adjudged in the supreme court from the organization of the state government to the period of the adoption of the new constitution, that is to say, from June term, 1818, to December term, 1832. By a statute of February 11, 1828, the reporter receives four dollars a page, for reporting and procuring to be printed the decisions of the court, provided he furnish to the state fifty bound copies free of expense.

Two volumes, containing the cases from January term 1833, to January term, 1839, inclusive, are now in a course of publication at Baltimore, by Volney E. Howard, state reporter, at the present time.

#### LOUISIANA.

The first reports of this state were published by Francis Xavier Martin, one of the judges of the supreme court.

The first two volumes, usually bound in one, were published in 1811-13, and are called Orleans term reports, being cases before the superior court of the territory of Orleans, from 1809 to 1812, inclusive. These were followed by ten volumes of Louisiana term reports, being cases decided in the supreme court of that state. They contain the cases to February term, 1823.

Judge Martin continued to report in the eight volumes of his Louisiana term reports, new series, the decisions of the supreme court, till March term, 1830. The first twelve volumes are cited as Martin's reports; from the twelfth, they are sometimes cited as first, second, &c., Martin's new series, and sometimes simply new series. Judge Martin's reports were, we believe, published on his own account. But by a statute of February 18, 1830, provision was made for the appointment of a reporter, by the governor, with the advice and consent of the senate. The third section of the act provides, "that the reports made under the authority of this act shall contain, first, a brief but clear statement of the facts of the case, taken from the record, second, the points made by the counsel and authorities cited in support of them, in all cases in which they shall be furnished, third, the opinion of the court in the case, and fourth, lucid marginal notes on the cases, and a copious index to each volume." The reporter receives a salary of twelve hundred dollars a year, on condition that he furnishes seventy-five copies well bound, for the use of the state, and that the price at which he shall furnish the reports to the public shall not exceed ten dollars a volume, to contain at least six hundred pages.

In February, 1830, Branch W. Miller received the appointment of reporter, and continued to report the cases from 1830, to August term, 1834; when he was succeeded by Thomas Currey, the present reporter. The reports of Messrs. Miller and Currey are cited as Louisiana reports.

Those of Mr. Miller are contained in the first five volumes, and the first part of the sixth volume, and those of Mr. Currey, in the subsequent volumes, to the thirteenth, which contains the cases down to and including the June term of the present year.

#### TENNESSEE.

The earliest reports of this state are two volumes of cases adjudged in the supreme court of law and equity (and in the federal courts), for the state of Tennessee, by John Overton, late one of the judges of the supreme court of law and equity, and subsequently one of the judges of the supreme court of errors and appeals. His volumes contain cases from November, 1791, to June term, 1815. These volumes were published in 1813-17, and are cited as Tennessee reports.

In 1814, William W. Cooke published a volume of cases adjudged in the supreme court of errors and appeals of Tennessee, and in the federal court for the district of West Tennessee. This volume includes the cases between 1811 and 1814, but probably does not contain any of the cases in judge Overton's reports.

This was followed by the reports of cases in the supreme court of errors and appeals, by John Haywood, one of the judges of said court, in three volumes, printed in 1818. They contain cases decided between 1816 and 1818. They are numbered three, four and five, in a series with judge Haywood's North Carolina reports, volumes one and two. In 1824, a volume of cases in the supreme court of errors and appeals, commencing September term, 1822, and ending with May term, 1824, was published by Jacob Peck, one of the judges. This was followed by the one or two volumes, we are uncertain which, of John H. Martin and George S. Yerger, containing cases in 1825-28.

In 1832, George S. Yerger, reporter to the state, commenced a series of reports of cases determined in the supreme court, and continued to report till the autumn of 1838. His eighth volume contains the cases in July term, 1835, and we presume the subsequent cases have been or will soon be published. Several of these volumes contain cases decided before the present supreme court was organized. We are not acquainted with the statute provisions for reporting the decisions of the latter court, nor with the name of Mr. Yerger's successor.

#### KENTUCKY.

The earliest reports of this state were published in 1803, and are entitled, "Reports of the causes determined by the late supreme court for the district of Kentucky, and by the court of appeals, in which the titles to lands were in dispute, by James Hughes." This is a quarto volume, and includes cases from 1785 to 1801. This was followed in 1805, by a small volume sometimes cited as Kentucky decisions. Of this volume Mr. Hardin, in his preface, says, "the legislature seems to have felt it their duty to interpose, and by an act of 1804, chap. 71, caused a publication of cases to be made, commencing about the period when Mr. Hughes's left off. This work was a bare transcript from the order book of the court of appeals, without an index, or even an alphabetical table of the cases. In this situation, the law it contained was hid in obscurity and trash; and by the omission of the facts on which the court adjudicated, was often calculated to mislead, when found."

In 1810, Martin D. Hardin, by authority of statutes of 1807, chap. 15, and 1809, chap. 142, published a volume of cases in the court of appeals, commencing when the Kentucky decisions ended, in the spring term, 1805, and concluding with the spring term, 1808. This was followed by the four volumes of George M. Bibb, late chief justice

of Kentucky, and "reporter of the decisions of the court of appeals," under the act of February 8, 1815. These volumes, published in 1815-17, contain the cases from the fall term, 1808, to the spring term, 1817.

Judge Bibb was succeeded as state reporter, by Alexander K. Marshall, whose three volumes contain the cases in the court of appeals from the fall term, 1817, to the fall term, 1821, inclusive. Mr. Marshall was succeeded as reporter, by William Littel, whose five volumes contain the cases from 1822 to 1824. Mr. Littel also published in 1824 a volume of decisions in the court of appeals of Kentucky, not before reported, containing decisions from 1795 to 1821, which are cited as Littel's select cases. Mr. Littel's reports were succeeded by those of Thomas B. Munroe, reporter of the decisions of the court of appeals, in seven volumes, containing the cases from the fall term, 1824, to 1828, inclusive. These were followed by the seven volumes of John J. Marshall, containing the cases from January, 1829, to October, 1832.

By statute of January 4, 1833, superseding former statute provisions, it was provided, that any person, who should obtain the consent of the judges of the court of appeals, and who should furnish the commonwealth with two hundred and fifty copies of such decisions of the court of appeals as may not have been reported—but which may in the opinion of the judges of said court, establish some new, or settle some doubtful point, or be otherwise deemed important by them to be reported, such person shall receive as a compensation therefor, at the rate of one dollar for every hundred pages contained in each volume of said reports, including tables and indexes. Since this act was passed, James G. Dana has published the decisions under the title of reports of select cases. His sixth volume contains some cases of the fall term of 1837, with most of those decided in the spring term of 1838.

## OHIO.

By a statute of January, 20, 1823, amended March 10, 1831, the office of state reporter was established, who should be appointed by the court for a term of five years, with a salary of three hundred dollars a year; and by the same statutes, the secretary of state is authorized to subscribe for one hundred copies of the reports, when printed, at a price not exceeding one cent for each page, of the size of Johnson's New York term reports.

Charles Hammond was appointed reporter and has continued to report to the present time. His first volume of cases in the supreme court of Ohio commences with the cases in August term, 1821, and his eighth volume recently published contains the cases in the December term, 1838. In 1832, P. B. Wilcox published in one volume the condensed reports of decisions in the supreme court of Ohio, containing all the cases decided by the court in bank from its organization to December term, 1831, with cases decided upon the circuit and ordered to be reported by the judges; and including all the decisions in the first four volumes of Hammond's reports. In his advertisement, the publisher says, "This volume embraces all the decisions of the supreme court, reported in the first four volumes of Hammond. No alteration whatever has been made either in the statement of cases, or in the opinions of the court. The work is simply a republication of the decisions as reported by Mr. Hammond. The arguments of counsel only are omitted."

In 1833, Mr. Hammond republished, in one volume, the cases reported in his first two, they being out of print. In this volume, instead of wholly omitting the arguments of counsel, as was done by Mr. Wilcox, he condensed his reports so far as to state only the points and give the authorities cited.



In addition to the regular series of Ohio reports, published by Mr. Hammond, of cases decided by the supreme court in bank, judge Wright, one of the justices of the supreme court, reported and published a volume of the cases at law and in chancery, decided by that court, on the circuit during the years 1831—1834, both inclusive. This volume, which was published in 1835, contains four hundred and ninety-eight cases, in the trial of which the reporter sat, only a few (five or six) of which are published in the Ohio reports. It is cited as Wright's reports.

#### INDIANA.

The only reports in this state are the cases determined in the supreme court of Indiana, reported by Isaac Blackford, one of the judges of the court, in three volumes, which contain the cases from May term, 1817, being the first term of the court, to November term, 1834, inclusive. The fourth volume, containing the subsequent cases, if not already published, may be expected soon. There appears to be no statute provision for the publication of reports in this state.

#### ILLINOIS.

In 1831, Sidney Breese published one volume of reports of cases at common law and in chancery, determined in the supreme court of Illinois, from its organization in 1819, to the end of December term, 1830. In his preface, Mr. Breese says, "It is the first publication of the kind ever attempted in this state." We believe that there exists no statute provision for reporting the cases adjudged in this state.

#### MISSOURI.

By statute of March 20, 1835, it is provided, that the attorney general shall be *ex officio* reporter of the opinions and decisions of the supreme court. This act provides that

the reports shall be published semi-annually and paged continuously, until there shall be sufficient matter to form one volume of not less than six hundred pages. The act also provides that fifteen hundred copies shall be published by the state. The compensation allowed for reporting the cases is one hundred and fifty dollars a year. Under authority of this act four volumes have been published. The first three contain the cases from March term, 1821, to August term, 1834, inclusive. The fourth volume, containing subsequent cases, we have not seen. The first two volumes cannot now be obtained, as most of the copies were destroyed by fire, when the legislative hall at Jefferson was burnt. We understand, however, that they are soon to be republished.

The whole number of volumes above mentioned is five hundred and thirty-six; and we may safely calculate on an annual addition of thirty volumes. Several sets have passed through a second edition, and some are stereotyped. Besides the above mentioned regular reports, there have been published at different times reports of single cases, which have been deemed particularly important, or have excited the attention of the public; such as the trials of Aaron Burr, and judges Peck and Chase, on impeachment, before the senate of the United States; the Dartmouth college case, and a variety of criminal and civil cases, both in the circuit courts of the United States and in the different state tribunals. For a catalogue of the most important of these, the reader is referred to the second volume of Mr. Hoffman's Legal Outlines.

In compiling this article we have derived some assistance from Griffith's Law Register, which gives a pretty accurate account of the reports up to the time of its publication in 1821, 1822. But most of the statements here made are founded on an examination of the works themselves, and on information

obtained from our correspondents in various states, to whose contributions we are much indebted, and who will please to accept our thanks for their valuable assistance. If, notwithstanding the great pains we have taken to make our account of American reports and reporters as full and as accurate as possible, any mistakes or omissions should be discovered therein, we hope some of our friends will do us the favor to point them out, and at the same time furnish us with the means for their correction.

G. G.

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#### ART. VI.—BIOGRAPHICAL SKETCH OF ELISHA COOKE.

ELISHA COOKE, the subject of this notice, filled an important place in the history of Massachusetts, during one of its most interesting periods. He was born in Boston, September 16, 1637, and was graduated at Harvard college at the age of twenty. In a class of seven, his name stands the fifth in the catalogue, indicating that his family was of an humble rank.

He studied medicine, and became a physician in Boston, where he practised with great success and a high professional reputation.

He took a part in politics pretty early in life, and continued to be deeply engaged in them as long as he lived. He was admitted a freeman in 1673, and from 1681 to 1683 was a representative in the general court, the last year having been speaker of the house.

It was during this period, it will be recollected, that the struggle was going on between the crown and the colony in relation to rescinding the charter, in which the malignant zeal of Randolph was so conspicuous. Mr. Cooke was among the most ardent in maintaining the integrity of the charter, and for his exertions in this respect, was charged,

with others of the same party, by Randolph, before the lords of the council, with being guilty of a high misdemeanor.

The party who were for sustaining the charter having the ascendancy in the colony, Mr. Cooke was chosen one of the assistants at the elections in 1684, 1685, and 1686, and was thus in the government when Dudley's commission as president of New England was received. All the efforts of the friends of the charter had in the mean time proved abortive. It had been annulled by arbitrary power, although with the forms of law, and the people found themselves at the mercy of a bigoted tyrant's caprice. Andros succeeded Dudley with greatly extended powers, and with no feelings of delicacy or humanity to restrain their utmost exercise. The party to which Cooke belonged were made to feel the oppressive hand of the government, until it could no longer be endured. The people rose at last, and deposing Andros, resumed their charter to which they were so strongly attached, and with it their former administration of the government. Cooke was made one of the council of safety, to whom in the mean time the powers of the government were committed, and Andros, Dudley and others of the deposed officers of the crown were sent home to England, to answer to the charges of the colony against them.

The prosecution of these charges became a matter of great moment, and it was deemed important to the colony, to be represented at London by some of their ablest men. Mather was already there, and with him was connected sir Henry Ashurst as colonial agent. Mr. Cooke and Mr. Oakes were selected as their associates for this purpose. They became embarrassed partly by their instructions, and partly by a disagreement among themselves, and instead of prosecuting their charges against Andros with any effect, they found themselves in the situation rather of defendants against attacks made upon the colony, than of complainants

against its oppressors. Andros and Dudley escaped censure, and were rewarded with new honors, while every effort of the agents to obtain a restoration of the former charter was resisted and defeated by the crown. Cooke adhered to his resolution to accept nothing in its stead, and when a new charter had been obtained through the instrumentality of Mr. Mather, he endeavored to prevent its adoption by the people of Massachusetts.

In consequence of this, the name of Mr. Cooke was left out of the commission of counsellors. The people, however, at the first election which took place in May, 1693, chose him a member of that body; but governor Phipps, in order to revenge himself upon Mr. Cooke, for having been opposed to his appointment as chief magistrate, refused to ratify the choice. Mr. Cooke did not lose any of his popularity by these measures, and upon governor Phipps being recalled to England, he was again elected to the council, and continued a member of that board until the arrival of governor Dudley, who, in 1703, negatived his election. The cause of this was the bitter hatred with which Dudley regarded those who had been the most active at the time of the revolution in 1689, and especially Mr. Cooke, on account of his exertions in England to prosecute the complaints of the colony against the associates of Andros.

The people, nevertheless, continued to manifest their confidence in Mr. Cooke, by electing him to the council, and the governor continued to indulge his revenge by negativing his election, until 1715, when he permitted him to take his seat at the council board, of which body he was a member at the time of his death.

He was appointed to the bench of the superior court as a successor to judge Richards, in 1695, and continued to hold the office until the arrival of governor Dudley in 1702. Upon his coming into office, a new commission was issued

to the judges of that court, and the name of Mr. Cooke was omitted.

This is the only connexion, of which there is any account, of Mr. Cooke with the judiciary of Massachusetts. Indeed, it was not to be expected, that any one whose principles were as liberal as his could find favor with a royal governor, and least of all, in the relation of judge, from whose want of independence, as the judiciary was then constituted, a subserviency to the power that commissioned him would be expected, but to which, as it was well known, Mr. Cooke would never submit.

It is, therefore, with the political history of the commonwealth, that his name is chiefly identified, and for more than forty years he held a prominent rank among the political men of his times. He was the idol of the people, and justly merited their regard. He left his name, his profession, his principles and his farm to his son, who more than filled his place, and was long distinguished as the leader of the democratic party of the province, in its struggle at a later period against the encroachments of the government. The name of Elisha Cooke, jr. is more familiar in the history of Massachusetts, than that of his father, who has been the subject of this article, but both were eminent physicians, both held high judicial offices, and each was in his day the leader of the popular party in the province.

Mr. Cooke married a daughter of governor Leverett. A daughter of his son Elisha married judge Saltonstall, and her descendants—always among the most respectable families in the commonwealth—are the only descendants of the family of Mr. Cooke.

He died on the 31st October, 1715, at the age of 78 years, leaving a large estate, retaining to the last the confidence of the people, and after pursuing through a long life a firm and consistent course as a politician.

E. W.

ART. VII.—OPINIONS OF THE LATE CHIEF JUSTICE MARSHALL  
ON QUESTIONS OF CONSTITUTIONAL JURISPRUDENCE.

*The Writings of John Marshall, late Chief Justice of the United States, upon the Federal Constitution.* Boston: James Munroe and Company, 1839.

THIS is an octavo volume of seven hundred pages, containing forty-one cases, decided in the supreme court of the United States, on constitutional grounds, in nearly all of which the opinions were delivered by the late venerable chief justice. Several of the cases appear, however, as an appendix to the constitutional opinions of the chief justice, and, in these, the opinions were pronounced by other members of the court. The following remarks from the editor's preface will explain the principles, by which he has been guided in making the compilation before us.

“ In the selection of cases the editor has been obliged to use his discretion, that the volume might not be too bulky. He has rejected those cases in which some principle was decided that has since been superseded by positive provision (such as the case of *Chisholm v. Georgia*, 2 Dallas, 419—480) ; those, also, in which a mere decision was given without the reasons producing it (for example, *Stuart v. Laird*, 1 Cranch, 299—309) ; those involving much common-law learning, and but slightly touching the federal constitution (as *Green v. Biddle*, 8 Wheaton, 1—108) ; and those relating rather to national than constitutional law (as *Brown v. United States*, 8 Cranch, 110—154). Dissenting opinions have, in general, been omitted ; in *Houston v. Moore*, 5 Wheaton, 1, that by Mr. Justice Story is retained, being an expression of Marshall's view, as well as his own, upon a somewhat dark point ; and in *Ogden v. Saunders*, 12 Wheaton, 213, the dissenting opinion of the chief justice himself is given, for obvious reasons. Three decisions made by the chief justice upon the circuit are included in the volume ; and also one of the supreme court not upon a con-

stitutional point,—that of *Johnson v. M'Intosh* ; in which last, the peculiar power of judge Marshall appears so fully as to make it come properly within this collection."

The editor prefaces each opinion with a statement of the facts in the case, short, indeed, but sufficient to render the opinion intelligible. The constitution of the United States is inserted at the end of the volume. The last case contained in the volume is that of *Satterlee v. Matthewson*, decided in 1829, and reported in the second volume of Mr. Peters's Reports. It did not enter into the editor's plan to publish a collection of constitutional cases, but only those which were decided by the late chief justice ; and, consequently, those of the last ten years are not given. The volume, therefore, may be said to present those views of constitutional law, which are peculiar to chief justice Marshall, and the jurists of his school. Some of these views have been greatly shaken if not entirely overruled by subsequent decisions, which it would be desirable perhaps to see in an equally accessible form.

We have only to remark of this work, that the task of the editor, (Mr. Perkins, of Cincinnati), has been performed in a very creditable manner ; and, that in our opinion it will prove an extremely acceptable present to the public, in general, as well as to the profession,—to the statesman no less than the lawyer. The typographical execution of the volume does honor to the publishers. We have rarely seen a law book or any other, of domestic manufacture, so beautifully and correctly printed.

L. S. C.



## JURISPRUDENCE.

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### I.—DIGEST OF ENGLISH CASES.

#### COMMON LAW.

Selections from 4 Bingham's New Cases, Part 4; 6 Dowling's P. C. Parts 4 and 5; 2 Nevile and Perry, Part 4; 3 Nevile and Perry, Part 4; 4 Meeson and Welsby, Part 2; 7 Adolphus and Ellis, Parts 1 and 2.

**ACTION ON THE CASE.** (*Case or trespass—Action for injury to reversion.*) A party who has demised a house without exception of mines, may sue in case for an injury occasioned to the house by a stranger in excavating coal; although it was not clear whether the injury resulted from excavation under the house, or under an adjoining house in the plaintiff's occupation. (Com. Dig. Grant, E. 3.) *Raine v. Alderson*, 4 Bing. N. C. 702.

**ARREST.** (*Discharge from, on ground of privilege.*) A defendant who is arrested while privileged *cundo*, &c. will be discharged as to that case only, and not also as to any detainers lodged against him, unless notice of the motion has been given to the parties concerned. *Sharplin v. Hunter*, 6 D. P. C. 632.

So in the case of a discharge from arrest on the ground of an irregularity to which the sheriff is no party. (9 Bing. 566.) *Ex parte Cogg*, 5 Scott, 715.

**COMPUTATION OF TIME.** The month to elapse after the delivery of an attorney's bill, before he can commence an action for its amount, under the 2 Geo. 2, c. 23, s. 23, must consist of twenty-eight days, exclusively both of the day of

delivering the bill and of the day of commencing the action. (15 Ves. 248; 9 B. & C. 134, 603; 3 M. & W. 473.) *Blunt v. Heslop*, 3 N. & P. 554.

**CONTRACT.** (*Performance of, not presumed from lapse of time.*) The lapse of twenty years from the time of making a contract to be performed in future, is not of itself evidence of a new contract averred to have been performed, and pleaded as an accord and satisfaction of the original contract. *Kirkman v. Siboni* (in error), 4 M. & W. 339.

**CONTRACT OF SALE.** (*When complete—Acceptance by purchaser.*) In assumpsit for a mare sold and delivered, to which the defendant pleaded non assumpsit, it appeared that the defendant, having seen and ridden the mare, wrote to the plaintiff, "I will take the mare at twenty guineas, *of course warranted*; and as she lays out, turn her out my mare." The plaintiff agreed to sell her for twenty guineas. The defendant subsequently wrote again to him—"My son will be at the World's End (a public house) on Monday, when he will take the mare and pay you: send any body with a receipt, and the money shall be paid; only say in the receipt, *sound and quiet in harness.*" The plaintiff wrote in reply, "She is warranted sound, and quiet *in double harness*: I never put her in single harness." The mare was brought to the World's End on the Monday, and the defendant's son took her away without paying the price, and without any receipt or warranty. The defendant kept her two days, and then returned her as being unsound. The learned judge stated to the jury that the question was whether the defendant had accepted the mare, and directed them to find for the defendant if they thought he had returned her within a reasonable time; and desired them also to say, whether the son had authority to take her without the warranty. The jury found that the defendant did not accept the mare, and that the son had not authority to take her away: Held, on a motion to enter a verdict for the plaintiff, that there was no complete contract in writing between the parties; that therefore the direction of the learned judge was right; that the defendant was not bound

by the act of the son in bringing home the mare, inasmuch as he thereby exceeded his authority as agent ; and consequently that the plaintiff was not entitled to recover. *Jordan v. Norton*, 4 M. & W. 155.

**COVENANT.** (*For quiet enjoyment.*) The generality of the covenant implied in law from the word *demise* is restrained by an express covenant for quiet enjoyment. (4 Rep. 806 ; 4 Taunt. 329.) It is therefore no breach of a covenant for quiet enjoyment, that the lessor had not power to demise. *Line v. Stephenson*, 4 Bing. N. C. 678.

**DEVISE.** (*By what words tenancy in common created.*) A testator devised his real estates to his two nieces, "equally between them, to take as joint tenants, and their several and respective heirs and assigns for ever :"—Held, that they took estates as joint tenants for life, with several inheritances on the death of the survivor. (Holt, 370 ; 2 P. Wms. 280 ; 1 Vent. 216 ; Salk. 226.) *Doe d. Littlewood v. Green*, 4 M. & W. 229.

**ESCAPE.** The permitting a defendant in the custody of the sheriff, against whom a *ca. sa.* has been lodged, to go out of prison, is a *voluntary* escape, although the act of the sheriff was occasioned by mistake. The sheriff, therefore, has no right to retake such defendant ; and if he does, the caption being a nullity, lapse of time will not be any objection to the defendant's discharge. (Cas. temp. Hardw. 310 ; 1 Sid. 330 ; Barnes, 373 ; 2 Wils. 294 ; 5 T. R. 25.) *Filewood v. Clement*, 6 D. P. C. 508.

**EVIDENCE.** (*Secondary evidence—Proof by attesting witness.*) Where an instrument is proved by a copy, as secondary evidence, and it thence appears that the original was attested by a subscribing witness, it is nevertheless unnecessary to call him. (8 Taunt. 450.) *Poole v. Warren*, 3 N. & P. 693.

**FOREIGN ATTACHMENT.** (*Recovery by, when a bar to subsequent against garnishee—Pleading—Estoppel.*) To a declaration for money had and received, the defendant pleaded a recovery by foreign attachment at the suit of a creditor of the plaintiff, and that the creditor had execution of the sum recov-

ered, according to the custom of London. The plaintiff replied that no execution was *executed*: on which issue was joined: Held, that without execution executed, the defendant was not discharged from his debt to the plaintiff (1 B. & B. 491); and that the defendant having joined issue on the fact of the execution, the jury were not estopped, by a record of satisfaction in the foreign attachment, from finding according to the fact (2 Rep. 4; Hob. 206; Ld. Raym. 1048); that the attorney of the defendant, the garnishee in the foreign attachment, was competent to prove the custom in such attachment: and that it is no answer to a plea of recovery under a foreign attachment, that the plaintiff has had no notice of the proceedings. *Magrath v. Hardy*, 4 Bing. N. C. 782; 6 D. P. C. 749.

**FRAUDS, STATUTE OF.** (*Sale of interest in land, what is.*)

The defendant in June agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2s. per sack, the plaintiff to have them at digging up time (in October), and to find diggers: Held, that this was not a contract for the sale of an interest in land, within the fourth section of the statute of frauds. (11 East, 362; 5 B. & C. 829; 1 C. & M. 89; 2 M. & W. 248.) *Sainsbury v. Matthews*, 4 M. & W. 343.

**LIBEL.** (*Evidence of publication.*) In an action against A. for publishing a libel, evidence sufficient to go to the jury is furnished by proof that a libel was actually published; that it was a printed paper, since destroyed; that it corresponded with a printed paper produced; that A. printed a paper corresponding with that produced, and sent 300 to a shop, from whence a person actually publishing the libel procured it; and that the libel was, on that occasion, taken from a parcel apparently containing 300. *Johnson v. Hudson*, 7 Ad. & E. 233, n.

2. (*Declaration—Construction of ambiguous words—Several counts.*) The plaintiff declared against the proprietor of a newspaper for libels contained in successive numbers of the paper referring to the same subject matter, and to each other.

The declaration stated in the commencement the occasion on

which the first libel was published, and set it out; it then proceeded: "And the defendant afterwards, to wit, on &c., further contriving and intending as aforesaid, in a certain other number of the said newspaper called &c., published of and concerning the plaintiff &c., a certain other false &c. libel, that is to say," (setting it out). Two other subsequent libellous paragraphs were afterwards introduced, and set out in the same number: Held, that each of these statements was a separate count.

One of the paragraphs was as follows:—"We again assert the cases formerly put by us on record; we assert them against A. S. and A. H. (the plaintiff); we again assert they are such as no gentleman or honest man would resort to:" Held, that these words imported a charge of misconduct against the plaintiff, not merely an assertion in contradiction of him, and therefore were actionable without the aid of any extrinsic averment. *Hughes v. Rees*, 4 M. & W. 204.

**MANDAMUS.** (*To whom it lies.*) A mandamus will not lie to the mere public depositaries of money, commanding the payment by them of a sum in gross.

A mandamus will not lie to the servants of the crown, strictly as such, commanding them to pay over money in their possession, in liquidation of claims on the crown. *In re Baron de Bode*, 6 D. P. C. 776.

**NAVIGATION.** (*Rights of public in navigable rivers.*) The right of the public to navigate a public river, is paramount to any right of property in the crown, which never had the power to grant a weir, so as to obstruct the public navigation. And if a weir which was legally granted in such a river, caused obstruction at any future time, it became a nuisance. (Hale de Jur. Maris, Pt. 1, c. 2; Davis, 57; 2 Inst. 38; Vaugh. 340. *Williams v. Wilcox*, 3 M. & P. 606.

**PATENT.** (*Particular of objections in action for infringement.*) A particular of objections delivered by the defendant in an action for infringing a patent-right, must be precise and definite. It is not sufficient to say that the improvements, or some of them, have been used before: the defendant should

point out which.—*Fisher v. Bewick*, 4 Bing. N. C. 706 ; S. C. nom. *Fisher v. Hewitt*, 6 D. P. C. 739.

**QUO WARRANTO.** Where a franchise (the granting of ale-house licenses by the vice-chancellor of the university of Cambridge) had been exercised without opposition from a very remote period, and it appeared probable, under all the circumstances of the case, that it emanated from a grant by the crown, and would have been frequently questioned, unless referable to some legal origin, and had been partly recognised in several ancient statutes, the Court refused to direct a quo warranto to try its validity, because its legal origin could not be distinctly traced. *Reg. v. Archdall*, 3 N. & P. 696.

**RESTRAINT OF TRADE.** Certain persons, who were carriers from London to various parts of Norfolk and other places, agreed to relinquish their trade of carriers on a particular branch of their line, for ever, in favor of A. The only consideration for this agreement was an undertaking by A. to pay them for one year a third part of the carriage on one kind of goods: Held, that this agreement not being injurious to the public, and the Court not being able to say that the consideration for the restraint was inadequate, a covenant enforcing the agreement was not illegal. (6 Ad. & E. 438.) *Archer v. Marsh*, 6 Ad. & E. 959 ; 2 N. & P. 562.

**STATUTE.** (*Construction of—What words compulsory.*) An act of parliament constituted a company for the purpose of making and maintaining a canal to be passable for boats. All persons were to be allowed to navigate the canal, certain tolls being paid by them to the company. The act provided also that in case of obstruction by any sunken vessel, the owners of which should not weigh it up within a certain time, *it should be lawful for the company to do so, and to keep the same till payment made of all expenses thereof*: Held, that these words were compulsory on the company, who therefore were liable in an action on the case for an injury occasioned by the non-removal in due time of a sunken vessel. (2 B. & Ald. 646 ; 2 Dwarries Stat. 712.) *Parnaby v. Lancaster Canal Company*, 3 N. & P. 523.

**WILL.** (*Revocation by marriage and birth of issue.*) Where

marriage and birth of issue operate as a revocation of a will of real property, it is in consequence of a *rule of law*, independent of the intention of the testator, and therefore all evidence as to such intention is inadmissible.

This rule of law is, that where an unmarried man, without children, makes his will, devising the whole of his real property, and leaves no provision for any child of a subsequent marriage, the law annexes the tacit condition that a subsequent marriage and the birth of a child operate as a revocation of the will.

Provision for the future wife only, the testator contemplating a marriage with her at the time, is not sufficient to prevent the revocation.

It seems, that the fact of property acquired subsequently to the will descending upon the issue of such marriage, would not prevent the revocation.

On an issue between an heir-at-law and a devisee, the question being whether the will was revoked by the testator's marriage and the birth of a child, prior wills of the testator are admissible in evidence; as are also his declarations previous to his will, relating to the dower of a future wife. *Marston v. Roe* (before all the judges), 2 N. & P. 504.

2. (*Revocation—Republication.*) At common law, a will may be revoked by an act of the testator which shows his intention, without the use of any words whatsoever. Therefore, where a testator threw his will on the fire, and it was rescued from the flames without his knowledge by the devisee, so that although the wrapper was partially burnt, the will itself was uninjured, and the testator expressed his displeasure, and declared he should make another will, but did not use any language declaratory of his intention to revoke his will:—Held, in an ejectment by the heir-at-law to recover copyhold property, that it was properly left to the jury to say whether what was then done by the testator was an actual intended revocation of the will. (Roll. Abr. Devise (O); Shep. Touch. 409; Cro. Jac. 497; 2 East, 488.)

Held, also, that the mere knowledge by the deviser of the

will's having been preserved, and his not again attempting to destroy it or to make another, were not of themselves evidence of a republication. (2 Lee's Cases, 55, 84.) *Doe d. Reed v. Harris*, 2 N. & P. 615.

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EQUITY.

Selections from 3 Mylne and Craig, Part 2.

**AMENDMENT.** (*Striking out names of relators.*) An application by the relators in an information, to strike out the names of several among themselves, will not be granted without strong grounds of justice or convenience, and it was not considered sufficient ground for such an application, that the relators proposed to be struck out were also members of the corporation, against which the information was filed. *Attorney-General v. Cooper*, 3 M. & C. 258.

**BOTTOMRY BOND.** (*Fraud—Jurisdiction.*) The court of chancery has undoubted jurisdiction to restrain proceedings in the admiralty courts upon a bottomry bond, where it appears that such bond was given for a fraudulent purpose, as in this case, where it was given by a master with apparent intent to defraud the owner and the mortgagees who claimed under him. It is of no consequence as to the existence of this jurisdiction, whether or not the admiralty courts have themselves an equitable jurisdiction in such a case, but supposing them to have such jurisdiction, it seems that it would be material to consider in which court proceedings had been first instituted. *Glascott v. Lang*, 3 M. & C. 451.

**COMPOSITION DEED.** (*Execution of, by mortgagee.*) A mortgagee was prevailed upon to execute a composition deed, purporting to assign among other things the mortgaged fund, but expressly subject to his mortgage, and for the benefit of other creditors besides himself and *other* mortgagees, and upon this deed was indorsed a memorandum declaring that the mort-



gagee should not, by execution of such deed, prejudice his security. There was no apparent intention to conceal this memorandum from other creditors who executed the deed. Held, that the security was not waived, by the usual clause in the deed releasing all claims, except under its provisions. *Lee v. Lockhart*, 3 M. & C. 302.

**MARKS IN TRADE.** (*Costs of injunction—Unnecessary litigation.*) A perpetual injunction was granted to restrain the defendants from the use of certain marks in trade, although they had used these marks in ignorance, as it appeared, of the right of the plaintiffs, and under the notion that they were technical descriptive marks, and although they had, upon being informed of the title of the plaintiffs, expressed their readiness to give up the use of them, and to make compensation for all injury done. But under these circumstances, and the right to an account being abandoned by reason of the smallness of the injury, the court refused to the plaintiffs the costs of the suit upon the ground of unnecessary litigation. *Millington v. Fox*, 3 M. & C. 338.

**PLEADING.** (*Plea and answer.*) Where a bill charges matters which if true would destroy an anticipated legal bar, a plea setting up that bar will be overruled unless supported by an answer negating those matters.

N. B. In this case leave was refused either to amend the answer or to withdraw both plea and answer. *Foley v. Hill*, 3 M. & C. 475.

**STATUTE OF LIMITATIONS.** (*Direction for payment of debts.*) A direction for payment of debts in a will of personal estate, will not stop the running of the statute of limitations. *Freake v. Craneheldt*, 3 M. & C. 499.

N. B. The decision in *Jones v. Scott*, 1 Russ. & Myl. 255, has recently been reversed in the house of lords, but the appeal is not yet reported.

2. Where the statute has once begun to run, its course will not be suspended by any intervening disability, as by the delay which may have elapsed between the death of the debtor and the taking out administration to his estate. S. C.

## II.—DIGEST OF AMERICAN CASES.

Selections from 13 Peters's (Supreme Court of the United States), and 8 Gill and Johnson's (Maryland) Reports.

**ACKNOWLEDGMENT OF DEEDS.** (*By guardian.*) A deed was executed and acknowledged under a decree, "W. M. Duncanson, guardian for Marcia Burnes;" and acknowledged by the guardian "to be his act and deed as guardian aforesaid, and thereby the act and deed of the said Marcia." This is a good execution and acknowledgment. *Van Ness v. The Bank of the U. S.* 13 Peters, 17.

**ACTION.** (*Attorney.—Joint and several note.*) The defendant in an action in the circuit court, had, with others, received the proceeds of a joint and several promissory note discounted for them at the bank of the metropolis, and this note was afterwards renewed by their attorney, under a power of attorney authorizing him to give a joint note; but he gave a joint and several note, the proceeds of which the attorney received, and appropriated to pay the note already discounted at the bank. The interest of the sum borrowed, was paid out of the money of the parties to the note. Held, that although the power of attorney may not have been executed in exact conformity to its terms; and may not have authorized the giving of a joint and several note, a question the court did not decide; yet the receipt of the proceeds of the note by the attorney, and the appropriation thereof to the payment of the former note, was sufficient evidence to sustain the money counts in the declaration. *Moore v. The Bank of the Metropolis*, 13 Peters, 402.

2. (*Mortgage by agent.*) A mortgage was executed by D. G. as the agent of the union steam mill company, conveying to the mortgagee certain lands in Rhode Island, with a woollen mill and other buildings, with the machinery in the mill. D. G. was, and had been the general agent of the company, and as such, had made all purchases and sales for the company, and the mortgage was executed by him, with the consent and authority

of the persons who at the time of its execution were members of the company. The machinery, and other movables had been taken in execution by the marshal of Rhode Island, under an execution issued on a judgment obtained after the mortgage against the company. The court held, that although the mortgage was not valid as the deed of the corporation, it was sufficient to convey a title to the mortgagee in the machinery; and that he could maintain an action of replevin for them against the marshal. *Anthony v. Butler*, 13 Peters, 423.

**AMBIGUITY.** (*What kind may be explained.*) Extrinsic evidence is not admissible to explain a patent ambiguity, that is, one apparent on the face of the instrument; but it is admissible to explain a latent ambiguity, that is, one not apparent on the face of the instrument, but one arising from extrinsic evidence; that is but to remove the ambiguity by the same kind of evidence as that by which it is created. *Bradley v. The Washington, Georgetown, and Alexandria Steam Packet Company*, 13 Peters, 89.

2. (*Same.*) Extrinsic parol evidence is admissible to give effect to a written instrument, by applying it to its proper subject matter, by proving the circumstances under which it was made; whenever, without the aid of such evidence, the application could not be made in the particular case. *Ib.*

**ASSETS.** A bill was filed claiming a specific performance of an alleged contract to convey a house and lot in Georgetown, for the benefit of the wife of the complainant, the complainant having expended a large sum of money in improving the property, in the expectation that it would be conveyed as required by the bill. The court, not considering that sufficient evidence of an agreement to convey the property was given, ordered that the property should be sold, and out of the proceeds that the advances made by the complainant should be repaid. The property sold for a sum far less than the amount expended. Held, that the balance unpaid after the sale, was not a debt due by the estate of the father of the wife, and could not be claimed of his representatives, the estate being insolvent. *King v. Thompson and another*, 13 Peters, 128.

2. (*Money paid to legal representatives.*) The Joseph Secunda was condemned for a violation of the laws of the United States, prohibiting the slave trade ; and by a decree, the district court of Louisiana allowed the claim of the collector, the surveyor, and naval officer, who had prosecuted for the forfeiture, to a portion of the proceeds of the sale of the property condemned. This decree was afterwards reversed, and the whole proceeds adjudged to the United States, on an appeal to the supreme court. William Emerson, the surveyor, afterwards died ; and in 1831, congress passed an act for the relief of the collector, the heirs of William Emerson, and the heirs of the naval officer ; under the authority of which the sums which had been adjudged to those officers, and which had remained in the district court of Louisiana, were by an order of the court paid to them according to the provisions of the law. One of the creditors of William Emerson claimed the sum so paid to his legal representatives, as assets for the payment of his debt. Held, that the payment made by order of the district court, to the minor children of William Emerson, as his legal heirs, was rightfully made ; and that the same cannot be considered in their hands as assets for the payment of the debts of their father. *Emerson's heirs v. Hall*, 13 Peters, 409.

ASSUMPSIT. (*For tobacco instead of money.*) Under the provisions of different acts of assembly, some of them passed more than a century ago, and when tobacco passed as currently as money, assumpsit will lie in Maryland, as well for tobacco, (where the contract is for payment in tobacco), as for current money, and in some such cases, judgments have been rendered for tobacco. *Marshall v. McPherson*, 8 G. & J. 333.

2. (*Dower.*) A widow having a right of dower in the lands of her deceased husband, may, instead of suing for, or receiving an assignment of her dower, by arrangement with the heir at law, or devisee, suffer him to rent out the lands, with the understanding, that she, in lieu of her dower, is to receive her proportion, or one third of the annual rent. In which case, if the heir at law, or devisee rents out the lands, and receives the

rents, and keeps from the widow her just proportion, she may recover in *assumpsit*. And if she marry again, her husband having an interest in the land, by virtue of his wife's right of dower, may in lieu of an assignment of dower make a like arrangement and recover his just proportion of the rents received to his use, in the life-time of his wife, in an action of *assumpsit*, brought either before or after her death. *Ib.*

**BILLS OF EXCHANGE.** (*Dishonored.*) A person who takes a bill, which on the face of it was dishonored, cannot be allowed to claim the privileges which belong to a bona fide holder without notice. If he chooses to receive it under such circumstances, he takes with it all the infirmities belonging to it; and is in no better condition than the person from whom he received it. There can be no distinction in principle, between a bill transferred after it is dishonored for non-acceptance, and one transferred after it has been dishonored for non-payment. *Andrews v. Pond and another*, 13 Peters, 65.

2. (*Relation of acceptor.*) The acceptor of a bill of exchange stands in the same relation to the drawee, as the maker of a note does to the payee; and the acceptor is the principal debtor in the case of a bill, precisely like the maker of a note. The liability of the acceptor grows out of, and is to be governed by the terms of his acceptance; and the liability of the maker of a note grows out of, and is to be governed by, the terms of his note: and the place of payment can be of no more importance in the one case than in the other. *Wallace v. McConnel*, 13 Peters, 136.

3. (*Declaration.*) In actions on promissory notes against the maker, or on bills of exchange where the suit is against the maker, in the one case, and the acceptor in the other, and the note or bill is made payable at a specified time and place; it is not necessary to aver in the declaration or prove on the trial, that a demand of payment was made, in order to maintain the action. But if the maker or acceptor was at the place, at the time designated; and was ready and offered to pay the money; it was matter of defence to be pleaded and proved on his part. *Ib.*

4. (*Foreign.*) The plaintiffs in an action on the second set of a foreign bill of exchange, which was protested for non-acceptance, with the protests thereto attached, can recover, without producing the first of the same set, or accounting for its non-production. *Downes v. Church*, 13 Peters, 205.

**BILL OF REVIEW.** (*Founded on some error apparent.*) A bill of review must be founded on some error apparent upon the bill, answer, and other pleadings, and decree; and a party is not at liberty to go into the evidence at large, in order to establish an objection in the decree, founded on the supposed mistake of the court, in its own deductions from the evidence. *Whiting and another v. The Bank of the United States*, 13 Peters, 6.

2. (*By whom a reversal may be claimed.*) No party to a decree can, by the general principles of equity, claim a reversal of a decree upon a bill of review, unless he has been aggrieved by it; whatever may have been his rights to insist on the error at the original hearing, or on an appeal. *Ib.*

**CARRIERS.** (*Liability of owner of stage coach.*) In an action against the owner of a stage coach used for carrying passengers, for an injury sustained by one of the passengers by the upsetting of the coach, the owner is not liable, unless the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage, in which he and his wife were passengers; and the facts that the carriage was upset, and the plaintiff's wife injured, are *prima facie* evidence that there was carelessness, or negligence, or want of skill upon the part of the driver; and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault. *Stokes v. Saltonstall*, 13 Peters, 181.

2. (*Same.—Evidence.*) It being admitted that the carriage was upset and the plaintiff's wife injured, it is incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared for the business in which he was engaged; and that he acted on this occasion with reasonable skill, and with the

utmost prudence and caution ; and if the disaster in question was occasioned by the least negligence, or want of skill, or prudence on his part ; then the defendant is liable in the action. *Ib.*

3. (*Same.*) If there was no want of proper skill, or care, or caution on the part of the driver of a stage coach, and the stage was upset by the act of the plaintiff or his wife, in rashly and improperly springing from it, then the defendant is not liable to an action : but if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses ; the plaintiff is entitled to recover : although the jury may believe, from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset ; and although they may also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage. *Ib.*

4. (*Same.*) If the driver was a person of competent skill, and in every respect qualified and suitably prepared for the business in which he was engaged, and the accident was occasioned by no fault or want of skill or care on his part, or that of the defendant or his agents, but by physical disability arising from extreme and unusual cold, which rendered him incapable for the time to do his duty ; then the owner of the stage is not liable in an action for damages, for an injury sustained by a person who was a passenger. *Ib.*

CHANCERY. (*Fraud.*) If A sells, or conveys his lands or slaves to B, and then produces to another his previous paper title, and obtains credit on the goods or lands, by pledging them for money loaned, he is guilty of fraud : and if the true owner stands by and does not make his title known, he will be bound to make good the contract ; on the principle that he who holds his peace when he ought to have spoken, shall not be heard now that he should be silent. He is deemed, in equity, a party

to the fraud. *The Bank of the United States v. Lee*, 13 Peters, 107.

2. (*Judgment creditor.*) It is a well settled principle in equity, that a judgment creditor, where he is compelled to pay off prior encumbrances on land to obtain the benefit of his judgment, may, by assignment, secure to himself the rights of the encumbrances; and the same rule applies, where a junior mortgagee is obliged to satisfy prior mortgages. He stands as the assignee of such mortgages, and may claim all the benefits under the lien that could have been claimed by the assignor. But the effects of this principle may be controlled by acts of the parties. *The Bank of the United States v. Peter*, 13 Peters, 123.

3. (*Legislature.*) Where the legislature declares certain instruments illegal and void, there is inherent in the courts of equity a jurisdiction to order them to be delivered up, and thereby give effect to the policy of the legislature. *Clarke and another v. Smith*, 13 Peters, 195.

**CHANCERY PRACTICE.** (*Decree in England and America.*)

In England, the decree always recites the substance of the bill and answer, and the pleadings, and also the facts on which the court founds its decree. But in America, the decree does not, ordinarily, recite these; and, generally, not the facts on which the decree is founded. But with us, the bill and answer, and other pleadings, together with the decree, constitute what is properly considered as the record. *Whiting and another v. The Bank of the United States*, 13 Peters, 6.

2. (*Foreclosure of mortgage.*) A decree of foreclosure of a mortgage, and of a sale, are to be considered as the final decree in the sense of a court of equity; and the proceedings on the decree are a mode of enforcing the rights of the creditor, and for the benefit of the debtor. The original decree of foreclosure is final on the merits of the controversy. If a sale is made after such a decree, the defendant not having appealed as he had a right to do, the rights of the purchaser would not



be overthrown or invalidated even by a reversal of the decree. *Ib.*

3. After a decree of foreclosure of a mortgage and a sale, and the death of the defendant takes place afterward, it is not necessary to revive the proceedings against the heirs of the deceased party, before a sale of the property can be made. *Ib.*
4. (*Exceptions to master's report.*) Strictly, in chancery practice, though it is different in some of the states of the union, no exceptions to a master's report can be made, which were not taken before the master, the object being to save time, and to give him an opportunity to correct his errors, or to reconsider his opinions. A party neglecting to bring in exceptions before the master, cannot afterwards except to the report; unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to re-examine it, with liberty to the party to take objections to it. *Story v. Livingston*, 18 Peters, 359.
5. Exceptions to the report of the master must state, article by article, the parts of the report which are intended to be excepted to. *Ib.*
6. Exceptions to the report of a master, in chancery proceedings, are in the nature of a special demurrer, and the party objecting must point out the errors; otherwise, the parts not excepted to will be taken as admitted. *Ib.*
7. (*Parties.*) The general rule in chancery proceedings is, that all persons materially interested in a suit ought to be parties to it either as plaintiffs or defendants, that a complete decree may be made between these parties. But there are exceptions to this rule, and one of them is, when a decree in relation to the subject matter in litigation can be made, without a person having that interest in any way concluded by the decree. *Ib.*
8. When a complainant omits to bring before the court persons who are necessary parties, but the objection does not appear on the face of the bill, the proper mode to take advantage of it is, by plea and answer. The objection of misjoinder of com-

plainants, should be taken either by demurer, or on the answer of the defendants. It is too late to urge a formal objection of the kind, for the first time, at the hearing. *Ib.*

**CLERKS OF THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES.** (*Appointment of.*) The law giving the district courts the power of appointing their own clerks, does not prescribe any form in which this shall be done. The power vested in the court is a continuing power; and the mere appointment of a successor would, *per se*, be a removal of the prior incumbent; so far at least as his rights were concerned. *Ex parte Duncan N. Hennen*, 13 Peters, 230.

2. The supreme court can have no control over the appointment or removal of a clerk of the district court; or entertain any inquiry into the grounds of the removal. If the judge is chargeable with any abuse of his power, the supreme court is not the tribunal to which he is answerable. *Ib.*

**COLLECTOR OF THE CUSTOMS.** (*Where party in fault.*)

Even courts of equity will not interfere to assist a party to obtain redress for an injury which he might, by ordinary diligence, have avoided. And, *a fortiori*, a court of law ought not, when the other party has by his very acts and omissions lost his own proper rights and advantages. *Bend v. Hoyt*, 13 Peters, 263.

2. (*Excess of Duties.*) A collector is generally liable in an action to recover back an excess of duties paid him as collector, when the duties have been illegally demanded, and a protest of the illegality has been made at the time of payment, or notice given that the party means to contest the claim. Nor is there any doubt that a like action generally lies, where the excess of duties has been paid under a mistake of fact, and notice thereof has been given to the collector before he has paid over the money to the government. *Ib.*

**CONSTITUTIONAL LAW.** (*Rights of corporations.*) An action was instituted in the circuit court of the United States for the district of Alabama, by the Bank of Augusta, Georgia, against the defendant, a citizen of Alabama, on bills of ex-

change drawn at Mobile, Alabama, on New York, which had been protested for non-payment, and returned to Mobile. The bill was made and indorsed for the purpose of being discounted by the agent of the bank, who had funds in his hands belonging to the plaintiffs for the purpose of purchasing bills of exchange, which funds were derived from bills and notes discounted by the bank in Georgia. The bills were discounted by the agent of the bank in Mobile, for the benefit of the bank, with their funds, to remit the said funds to the bank. The defendant defended the suit on the facts that the bank of Augusta is a corporation incorporated by an act of the legislature of Georgia, and have power such as is usually conferred on banking institutions, such as to purchase bills of exchange, &c. The circuit court held that the plaintiffs could not recover on the bills of exchange, and that the purchase of the bills by the agent of the plaintiffs was prohibited by the laws of Alabama, and gave judgment for the defendant. In the case of the *United States Bank of Pennsylvania v. Primrose*, the plaintiffs, a corporation by virtue of a law of the state of Pennsylvania, authorized by its charter to sue and be sued in the name of the corporation, and to deal in bills of exchange, and composed of citizens of Pennsylvania, and of the states of the United States, other than the state of Alabama, (the agent of the bank resident in Mobile, and in possession of funds belonging to the bank, and intrusted with them for the sole purpose of purchasing bills of exchange,) purchased a bill of exchange, and paid for the same in notes of the branch of the Bank of Alabama, at Mobile. The bill was protested for non-payment, and a suit was instituted in the circuit court against the payee, the indorser of the bill. The question for the opinion of the circuit court was, whether the purchase of the bill of exchange by the United States Bank was a valid contract, under the laws of Alabama. The circuit court decided that the contract was void, and gave judgment for the defendant. The case of the *New Orleans and Carrollton Railroad Company v. Joseph B. Earle*, was similar to that of the *Bank of Augusta v. Joseph B. Earle*.

The supreme court reversed the judgment of the circuit court in the three cases ; and held the contracts for the purchase of the bills valid : and that the plaintiffs acquired a legal title to the bills by the purchase. *The Bank of Augusta v. Earle*, 13 Peters, 519.

2. (*Contracts of corporations.*) Whenever a corporation makes a contract, it is the contract of the legal entity ; of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state. *Ib.*
3. It may be safely assumed, that a corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter ; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes. And, if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void. *Ib.*
4. (*Rights of corporations under the laws and constitution of the United States.*) It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law ; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognised in other places ; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible ; yet it is a person for certain purposes, in contemplation of law ; and has been recognised as such by the decisions of the supreme court. It is sufficient that its existence as an artificial person,

in the state of its creation, is acknowledged and recognised by the law of the nation where the dealing takes place ; and that it is permitted by the laws of that place, to exercise there the powers with which it is endowed. *Ib.*

5. Courts of justice have always expounded and executed contracts made in a foreign country according to the laws of the place in which they were made ; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered ; and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong ; that courts of justice have continually acted upon it, as a part of the voluntary law of nations. *Ib.*
6. The court can perceive no sufficient reason for excluding from the protection of the law the contracts of foreign corporations ; when they are not contrary to the known policy of the state, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another state ; and clothed with the power of making certain contracts. It is but the usual comity of recognising the law of another state. *Ib.*
7. In the legislation of congress, where the states and the people of the several states are all represented, we shall find proof of the general understanding in the United States that by the law of comity among the states, the corporations chartered by one were permitted to make contracts in the others. *Ib.*
8. It is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts ; and that the same law of comity prevails among the several sovereignties of this union. The public, and well-known, and long-continued usages of trade ; the general acquiescence of the states ; the particular legislation of some of them, as well as the legislation

of congress; all concur in proving the truth of this proposition. *Ib.*

**CORPORATION.** (*Departure from charter.*) Where a company was incorporated, "for the purpose of establishing and conducting a line or lines of steamboats, vessels, and stages, or other carriages, between P. and B. for the conveyance of passengers, and transportation of merchandise and other articles," a contract by such company, for the breaking of ice and towing vessels through the track thus broken, such vessels being bound for V., is invalid, and cannot be enforced against them. *The Pennsylvania, &c. Co. v. Dandridge*, 8 G. & J. 248.

2. (*Estoppel.*) The circumstance that a corporation has entered into a contract, does not estop it from denying its competency to do so in an action brought against it, founded upon such contract. If such was the case, in reference to the corporation, the estoppel would apply equally to the other contracting party, and thus in effect, limitations upon the powers of corporations would be of no avail. *Ib.*

3. (*Ratification by principal of agent's contract.*) The county court in instructing the jury, as to the facts which it would be necessary to find, to shew an adoption and ratification by the defendants, of the contract alleged to have been made by their agent, said, that if the consideration for such contract had been received by the agent, and paid over to the defendants, who retained the same, that then the said facts are in law an adoption of the contract, and as binding on them as if a previous authority had been given the agent. This instruction was held to be erroneous; first, because the jury was not required to find, that the defendants *knew* on what account the money was paid them,—and second, that the defendants knew the terms of the contract on which the money was received. *Ib.*

**COURT OF CHANCERY.** (*Party bound by beneficial contract.*)

Where a party reaps profits by his own voluntary act, founded upon contract with another, he is not as against the creditors of such other party at liberty to vacate his contract to their prejudice, and claim to participate in equity and conscience, upon

the insolvency of such other party, equally with his creditors in his estate and in opposition to the terms and effect of the original agreement. *Maryland Savings Institution v. Schroeder*, 8 G. & J. 93.

2. ("Good will.") A court of equity has no jurisdiction over what is called "good will," and where a bill was filed upon a contract alleged to be of that description, claiming of the purchaser or party in possession, an account of rents and profits, arising from certain stalls in market houses in the city of Baltimore, the bill was dismissed, but under the circumstances of the case, without cost. *Zeigler v. Sentzner*, 8 G. & J. 150.
3. (*Same.*) For the violation of such a contract, if the subject be one fit for a contract, the remedy is at law, where damages may be given by a jury. *Ib.*
4. (*Complainant in fault.*) No man is entitled to the aid of a court of equity when that aid becomes necessary by his own fault. *Dilly v. Heckrotte and Barnard*. 8 G. & J. 170.
5. (*Bill of discovery.*) If facts essential to the case of either party rest in the knowledge of the opposite party, it is too late after a trial at law, for the losing party to apply to a court of equity for relief upon that ground. He should have filed his bill for a discovery before the trial. *Ib.*
6. (*Statute.*) Where a statute has made provision for all the circumstances of a particular case, no relief in equity can be afforded, although the provisions of the statute may conflict with the notions of natural equity and justice entertained by a court of equity. *Glenn and Kennedy v. Fowler and another*, 8 G. & J. 340.
7. (*Grant of fishery.*) The grant of a several fishery, in a public navigable river, cannot be presumed from the mere uninterrupted use and enjoyment of the right of fishing for more than twenty years. *Delaware and Maryland Rail-Road Co. v. Stump*, 8 G. & J. 479.
8. (*Same.*) If such presumption can be made at all, from the fact of such use and enjoyment, it must be shown to have been in exclusion of the right of others, and the absence of an aver-

ment to that effect, in a bill praying for an injunction to protect such right, was held to be fatal to the complainant's case. *Ib.*

9. (*Steamboats and wharves.*) Though the grant of a right to erect wharves, and employ steamboats, if destructive of the paramount right of general navigation and fishing, may be void; the remedy is not by injunction, which is only applicable to special injuries in violation of private rights. Public grievances are not to be redressed by individuals at their own suit. *Ib.*

DEVISE. (*How construed.*) The testator devised to his wife one third of his personal estate for ever, for her own proper use and benefit, and also one third of all his real estate, during her lifetime, and in the event of her death, all the right in real property bequeathed to her should be, and by the will is declared to be vested, in his infant son. The testator then proceeded to devise sundry lots and houses to his mother, his sisters, his brothers, separately, and his son. These are given to their respective devisees "as their property for ever." He then devised the balance of his real estate to his infant son "for ever," believed to be certain lots specified in the will. Held, that the wife took under the will, one third of all the real estate of the testator, during her life, and that his son took a fee simple in one third of the property given to the brothers and sisters of the testator, subject to the devise to his mother, and a fee simple in all the real estate, specifically devised to him, subject to the devise of one third to his mother during her life. *Walker v. Parker and another*, 13 Peters, 166.

2. ("*Estate*"—*meaning of.*) The word "estate" in a devise, will be *descriptive* of the subject of property, or of the *quantum* of interest, according to the context, and will pass a fee, when the intention of the testator does not restrict it to import a description, rather than an interest. *Hammond v. Hammond*, 8 G. & J. 437.

DOWER. (*Damages.*) A widow can only, in equity, recover damages from the alienee of her husband, for the detention of her dower. A court of law cannot award them. *Sellman v. Bowen*, 8 G. & J. 50.



**DUTIES.** (*Right of government to.*) The right of the government to the duties accrues, in the fiscal sense of the term, when the goods have arrived at the port of entry. The debt for the duties is then due, although it may be payable afterwards, according to the regulations of acts of congress. *Meredith and another v. The United States*, 13 Peters, 486.

2. The debt due to the United States for duties on imported merchandise, is not extinguished by the giving of bonds, with surety, for the same. The revenue collection act of 1799, ch. 128, requires that the collector should take the bonds for the duties from all the persons who are the importers; whether they be partners or part owners. *Ib.*

3. The government of the United States have a right to retain money in their hands belonging to a surety in a bond given for duties which are unpaid, until a suit shall be terminated for the recovery of the amount of the duties on the goods due by the importers. The government is not obliged to appropriate the money of the surety to the satisfaction of the bond, but may hold it as a security until the suit is determined. *Ib.*

**EVIDENCE.** (*To explain written contract.*) The plaintiff in error had by an agreement in writing, hired a steamboat to be put "on the route" from Washington, in the district of Columbia, to Potomac creek, until another steamboat, then building, should be prepared, and put "on the route." The plaintiff in error was the contractor for carrying the mail of the United States, which was carried in a steamboat to Potomac creek; except in winter, when the navigation of the river Potomac was interrupted by ice, when the mail was carried by land. The steamboat so hired was employed in carrying the mail. The ice prevented the use of the steamboat; and the owners claimed, under the contract, the hire of the boat during the time her employment was thus interrupted. The circuit court refused to allow parol evidence to be given to show the purpose for which the steamboat was employed, and to explain the meaning of the terms used in the contract, and of other matters conducing to show the meaning of the

contract. The court held that the evidence was admissible. *Bradley v. The Washington, Georgetown, and Alexandria Steam Packet Company*, 13 Peters, 89.

2. (*Pedigree.*) From necessity, in cases of pedigree, hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in the different branches. The declaration of these individuals, they being dead, may be given in evidence to prove pedigree. And so is reputation; which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary with the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. *Stein v. Bowman*, 13 Peters, 209.
3. (*Diligence.*) To sustain a claim to the admission of the deposition of a witness in evidence, the affidavit of a person who represented himself to be the agent of the plaintiff, stated that the witness had left Louisiana before the commencement of the suit, and ascended the Mississippi, with the intention of going to Ohio; and that since then, the person who made the affidavit had not heard from him, although he had made inquiries. By the court: This does not amount to that degree of diligence which the law requires to introduce secondary evidence. *Ib.*
4. (*In bar of statute of limitations.*) In an action of assumpsit on an open account, the plaintiff to remove the bar of the statute of limitations, proved that within three years of the commencement of the suit, the defendant said to the witness, it was his impression the money had been paid by his, defendant's father. That if his father had paid it, he could find, he supposed, the receipt on searching his father's papers; and if he could not find the receipt, he would settle it; and promised to make a search and inform the witness. Held, that the evidence was sufficient to remove the bar. *Sothoren v. Hardy*, 8 G. & J. 133.
5. (*Slave.*) Proof that a negro woman had been living and acting

as a free person from the 27th of July, 1830, to the 11th of October, 1836, does not furnish any evidence whatever in support of her claim to freedom, unless it can be shown, that the party entitled to her custody and service, knew of her place of residence during the period of her so living and acting. *Wilson v. Negro Ann Barnet*, 8 G. & J. 159.

6. (*To establish parol gift.*) Where evidence had been offered for the purpose of establishing a parol gift of a negro slave by a deceased testatrix to the plaintiff; and the defendant had read to the jury a letter from the plaintiff to him, written subsequently to the date of the will of the testatrix, inconsistent with the idea of exclusive property in the plaintiff; the defendant was permitted to read the will, though executed after the alleged gift, for the purpose of explaining the plaintiff's letter, and showing his recognition of the right of the testatrix to bequeath the property. *Divers v. Fulton*, 8 G. & J. 202.

7. (*Agency.—Interest.*) The agent, a stockholder, of an incorporated company (the defendant in the action), who made the contract with the plaintiff, is not a competent witness for said company in regard to such contract. In such a case, the witness has a direct interest in the event of the suit, independently of his acts as agent. *The Pennsylvania, &c. Co. v. Dandridge*, 8 G. & J. 248.

**EXECUTORS AND ADMINISTRATORS.** (*Presumption of slavery from color—how rebutted.*) The presumption of slavery arising from color, upon an application for administration of an estate, is sufficiently rebutted in relation to the grant of letters, by the fact, that the deceased engaged in a voyage to foreign ports as a sailor, that his wages which constituted the known part of his estate had been recovered at law in his name, and not been claimed by any owner after the lapse of many years. *Hoffman v. Gold*, 8 G. & J. 79.

**FRAUD.** (*In representations of value of property.*) The party selling property must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind; but if he

does not know it, then it can only be from gross negligence : and, in contemplation of a court of equity, representations founded on a mistake resulting from such negligence are fraud. The purchaser confides in them upon the assumption that the owner knows his own property, and truly represents it. And it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller. The misrepresentations of the seller of property, to authorize the rescinding of a contract of sale by a court of equity, must be of something material, constituting an inducement or motive to purchase ; and by which he has been misled to his injury. It must be in something in which the one party places a known trust and confidence in the other. *Smith v. Richards*, 13 Peters, 26.

2. Whenever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has not seen, but which he buys upon the representation of the seller, relying on its truth ; then the representation in effect amounts to a warranty ; at least the seller is bound to make good the representation. *Ib.*

**FREIGHT.** (*General average.*) The freight of a vessel totally lost by being run on shore for her preservation and that of the crew and cargo, ought to be allowed to the owner of the vessel, as the subject of general average ; the cargo of the vessel being saved by the stranding. *The Columbian Insurance Company of Alexandria v. Ashby, Stribbling and another*, 13 Peters, 331.

**GENERAL AVERAGE.** The brig Hope, with a cargo, bound from Alexandria, in the district of Columbia, for Barbadoes, insured in Alexandria, was assailed, while standing down the Chesapeake bay, by a storm which soon after blew to almost a hurricane. The vessel was steered towards a point in the shore for safety, and was anchored in three fathoms water ; the sails furled, and all efforts were made, by using the cables and anchors, to prevent her going on shore. The gale increased, the

brig struck adrift, and dragged three miles ; the windlass was ripped up, the chain cable parted, and the vessel commenced drifting again, the whole scope of both cables being paid out. The brig then brought up below Craney island, in two and a half fathoms water ; where she thumped or struck on the shoals on a bank, and her head swinging round brought her broad side to the sea. The captain finding no possible means of saving the vessel and cargo, and preserving the lives of the crew, slipped her cables, and ran her on shore for the safety of the crew and preservation of the vessel and cargo. The vessel was run far up on a bank ; where after the storm she was left high and dry, and it was found impossible to get her off. The lives of all the persons were saved ; the whole cargo of the value of \$5335, insured for \$4920, was taken out safely, and the vessel, her tackle, &c., were sold for \$256. Held, that the insurers of the cargo were liable for a general average. *The Columbian Insurance Company of Alexandria v. Ashby and Stribling and another*, 13 Peters, 331.

- GUARDIAN.** (*Liability of.*) Where a guardian had received a sum of money belonging to his ward, and on the day of its receipt, had deposited it in a banking institution then in good credit, but which subsequently failed, and taken a certificate therefor payable to himself, or order ; it was *held*, that the loss resulting from the failure of the bank should fall upon him, though on the day of the deposit, by indorsement on the certificate, he declared it to be the property of his ward, and placed in the bank for his benefit. *Jenkins v. Walter*, 8 G. & J. 218.
2. (*Same.*) If in such a case the party making the deposit had failed before the bank, the money deposited would have enured to the benefit of his creditors, and the ward must have sustained the loss ; and although the exhibition of the indorsement on the certificate might have defeated the claims of creditors, the bank itself might have applied the fund in satisfaction of any claim due it from the depositor. *Ib.*

**INSURANCE.** (*Illegal capture.*) When a vessel, insured on a sealing voyage, was ordered by the government of Buenos Ayres

not to catch seal off the Falkland islands ; and having continued to take seal there, the vessel was seized and condemned, under the authority of the government of Buenos Ayres ; the government of the United States not having acknowledged, but having denied the right of Buenos Ayres to the Falkland islands ; the insurers were liable to pay for the loss of the vessel and cargo : the master in refusing to obey the orders to leave the island, having acted under a belief that he was bound so to do as a matter of duty to the owners, and all interested in the voyage, and in vindication of the right claimed by the American government. The master was not bound to abandon the voyage under a threat or warning of such illegal capture. *Williams v. The Suffolk Insurance Company*, 13 Peters, 415.

2. (*Meaning of words "with liberty."*) In an action of covenant upon a policy of insurance, in which the words "with liberty" of a port were used, it was *held*, that those words, confer a power subordinate to the general course of the voyage. *Allegré's Adm'rs. v. Maryland Ins. Co.*, 8 G. & J. 190.
3. (*Same.*) They do not necessarily import an intention to trade at the port mentioned ; nor do they amount to an assurance, or intimation to the underwriter, that the assured looked to the port of privilege, under any circumstances in the contemplation of the parties, as that, at which the voyage was designed to terminate. *Ib.*
4. (*Live stock.*) When insurance is demanded on live stock, it is the duty of the assured to notify the assurers of the nature of the cargo, and his failure to do so vitiates the policy. *Ib.*

JUDGMENTS IN STATE COURTS. (*How regarded.*) Although a judgment in the court of a state is not to be regarded in the courts of her sister states as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain an action of debt upon the judgment ; it is to be considered only distinguishable from a foreign judgment in this, that by the first section of the fourth article of the constitution, and by the act of May 26, 1790, sect. 1, the judgment is conclusive on the merits, to which full faith and credit shall be given when authenticated as the

act of congress has prescribed. *M'Elmoyle v. Cohen's Administrators*, 13 Peters, 312.

**LEX LOCI.** (*Usury.*) The general principle, in relation to contracts made at one place to be executed at another, is well settled. They are to be governed by the laws of the place of performance; and if the interest allowed by the laws of the place of performance be greater than that permitted at the place of the contract, the parties may stipulate for the highest interest, without incurring the penalties of usury. *Andrews v. Pond and another*, 13 Peters, 65.

2. (*Same.*) When a contract has been made without reference to the laws of the state where it was made, or to the laws of the place of performance, and a rate of interest was reserved forbidden by the laws of the place where the contract was made, which was concealed under the name of exchange, in order to evade the law against usury, the question is not which law is to govern in executing the contract; unquestionably it must be the law of the state where the agreement was entered into, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last mentioned cases the agreements were permitted by the *lex loci contractus*, and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws, and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void every where. *Ib.*

**LIEN.** (*Reversion.*) There is a current of authorities going to prove that a reversion after an estate for life is bound by a judgment obtained against the ancestor, from whom it immediately descended. *Burton v. Smith*, 13 Peters, 464.

**LIMITATION OF ACTIONS.** (*Conflict of law.*) The plea of the statute of limitations, in an action instituted in one state on a judgment obtained in another state, is a plea to the remedy; and consequently, the *lex fori* must prevail in such a suit. *M'Elmoyle v. Cohen's Adminr's*, 13 Peters, 312.

2. (*Same.*) A suit in a state of the United States, on a judgment obtained in the courts of another state, must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred. The statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state court of the state of South Carolina. *Ib.*

MANDAMUS. (*Decrees of inferior courts.*) A writ of mandamus is not a proper process to correct an erroneous judgment or decree rendered in an inferior court. That is a matter which is properly examinable on a writ of error, or on an appeal to the proper appellate tribunal. Nor can the supreme court issue a mandamus to the district court, on the ground that it is necessary for the exercise of its appellate jurisdiction; for if there is any appellate jurisdiction in this case, it is direct and immediate to the circuit court of the southern district of New York. It has been repeatedly declared by the supreme court, that it will not, by mandamus, direct a judge to make a particular judgment in a suit, but will only require him to proceed to render judgment. *Ex parte Jesse Hoyt, collector of the port of New York*, 13 Peters, 279.

MORTGAGE. (*Issue of slave mortgaged.*) The issue of a mortgaged slave, born after the title of the mortgagee has become absolute at law, and during the possession of the mortgagor, is liable for the payment of the mortgage debt; and such issue may be sold upon a bill filed to enforce payment, although no specific notice of the issue is taken in the bill. *Iglehart v. Merriken*, 8 G. & J. 39.

PLEAS AND PLEADINGS. (*Declaration.*) Where the declaration charges, that the injury sustained by the plaintiff is the result of the total neglect and refusal of the defendant to perform his engagement; evidence of a negligent and imperfect performance is inadmissible, and by implication contradictory of the charge. Under such a declaration, the right of the plaintiff to damages is limited to such as naturally result from defendants' total neglect and refusal to perform their contract, and they cannot be enlarged by evidence of a negligent per-



formance. *The Pennsylvania, &c. Co. v. Dandridge*, 8 G. & J. 248.

2. (*Same.*) A declaration which alleges a contract to tow a vessel and cargo out, safely and securely, is not supported by proof of a contract to tow out free from a particular description of danger. *Ib.*

**PUBLIC LANDS.** (*Power of congress.*) Congress have the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the government in reference to the public lands declares the patent to be the superior and conclusive evidence of legal title. Until it issues the fee is in the government; which by the patent passes to the grantee, and he is entitled to recover the possession in ejectment. *Bagnell and another v. Broderick*, 13 Peters, 439.

2. (*Same.*) No doubt is entertained of the power of the states to pass laws authorizing purchasers of lands from the United States to prosecute actions of ejectment upon certificates of purchase, against trespassers on the lands purchased; but it is denied that the states have any power to declare certificates of purchase of equal dignity with a patent. Congress alone can give them such effect. *Ib.*

3. (*Power of states.*) A state has a perfect right to legislate as she may please in regard to the remedies to be prosecuted in her courts; and to regulate the disposition of the property of her citizens, by descent, devise, or alienation. But congress is invested, by the constitution, with the power of disposing of the public land, and making needful rules and regulations respecting it. *Wilcox v. Jackson, Lessee of M<sup>c</sup>Connell*, 13 Peters, 490.

4. (*Same.*) - Where a patent has not been issued for a part of the public lands, a state has no power to declare any title, less than a patent, valid against a claim of the United States to the land; or against a title held under a patent granted by the United States. *Ib.*

5. (*Same.*) Whenever the question in any court, state or federal, is, whether the title to property which had belonged to the United States has passed, that question must be resolved by the

laws of the United States. But whenever the property has passed, according to those laws, then the property, like all other in the state is subject to state legislation ; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States. *Ib.*

#### RECORDING OF DEEDS AND MORTGAGES. (*Mortgage.*)

A mortgage was recorded by the town clerk of the place, where the property was, he being the proper officer to record such instruments, under the statute of Rhode Island. He kept two books, in one of which he recorded mortgages, which included real estate ; and in the other, mortgages upon personal property only. The mortgage in this case was first recorded in the book kept for recording mortgages on real estate. And he gave a certificate, " lodged in the town clerk's office to record, November 20th, 1837, at 5 P. M., and recorded same day, in the record of mortgages in East Greenwich, book No. 4," &c. The court held that this certificate was properly received in evidence, in the circuit court. *Anthony v. Butler*, 13 Peters, 423.

#### SALE OF A STRANDED VESSEL BY THE MASTER.

(*Rules respecting.*) The right of the master to sell a vessel stranded, depends on the circumstances under which it is done to justify it. The master must act in good faith, and exercise his best discretion for the benefit of all concerned : and a sale can only be made on the compulsion of a necessity, to be determined in each case, by the actual peril to which the vessel is exposed, and from which it is probable, in the opinion of persons competent to judge, the vessel cannot be saved. This is an extreme necessity. *The New England Insurance Company v. The Brig Sarah Ann*, 13 Peters, 387.

2. (*Same.*) The true criterion for determining the authority of the master to sell a vessel stranded near a foreign port, or in a port of the United States, or of a different state than that to which the vessel belongs, or in which the owners may be or reside, when the necessity occurs, is the distance of the owners or insurers from the scene of stranding. If by the ordinary means to convey intelligence of the situation of the vessel, the

master can obtain directions as to what he should do, he should resort to those means. But if the peril is such, that there is a probability of loss, and it is made more hazardous by every day's delay, the master may act promptly to save something for the benefit of all concerned, though but little can be saved. There is no way of doing so more effectual, than by exposing the vessel to sale; by which the enterprize of such men is brought into competition as are accustomed to encounter such risks, and who know from experience how to estimate the probable profits of such adventures. *Ib.*

3. (*Same.*) The power of the master to sell the hull of the stranded vessel exists also as to her rigging and sails; which he may have stripped from her, after unsuccessful efforts to get her afloat; or when his vessel in his own judgment and that of those competent to form an opinion and to advise cannot be delivered from her peril. *Ib.*
4. (*Same.*) If the master sells without good faith, or without a sound discretion, the owner may against the purchaser assert his right of property in the sails and rigging; as he may in any case of a stranded vessel, which has been sold without good faith in the master. *Ib.*
5. (*Same.*) The court do not think the case of *Smith v. Briddle*, 2 Washington C. C. R. 150, sound law. It is expressed in terms too broad. *Ib.*

**SALES OF PERSONAL PROPERTY.** (*Without delivery.*) A bill of sale of personal property, duly executed, acknowledged and recorded, is as valid and effectual to pass the legal title to the vendee, as if there was an actual delivery of the property transferred. *Clary and Clary v. Frayer*, 8 G. & J. 398.

**USURY.** (*Exchange.*) There is no rule of law fixing the rate which may be charged for exchange. It does not depend on the cost of transporting specie from one place to another; although the price of exchange is no doubt influenced by it. *Andrews v. Pond and another*, 13 Peters, 65.

2. (*New security.*) If, in consideration of further forbearance, a creditor receives a new security from his debtor for an existing

debt, he cannot enlarge the amount due by exacting any thing, either by way of interest or exchange, for the additional risk, which he may suppose he runs by this extension of credit ; nor on the opinion he may entertain as to the punctuality of payment, or the ultimate safety of his debt. *Ib.*

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### III.—MISCELLANEOUS CASES.

#### *In the Supreme Court of Pennsylvania :—Middle District.*

COMMONWEALTH, ON THE RELATION OF OVID F. JOHNSON, ATTORNEY GENERAL, AGAINST ORISTUS COLLINS.

*Quo Warranto* :—tenure of judicial office in Pennsylvania ;—operation of the provisions of the amended constitution on the commissions of judicial officers.

THE amended constitution of Pennsylvania was agreed to in convention, February 22, 1838, and ratified by the people on the ninth of October following, to take effect from the first of January, 1839.

By the fifth article of the second section, the tenure of judicial office, which, by the old constitution, was that of good behavior merely, was limited to the several periods of fifteen, ten, and five years, in relation to certain corresponding classes of officers, who were, however, subject as before to the condition of good behavior. By the same article, the power of appointment, which was originally vested in the governor alone, was placed in the hands of the governor, "by and with the consent of the senate." The seventh section provided for the going out of office, at certain specified times, of the several judicial officers then in commission, in pursuance of the limited tenure established by the new constitution. The new constitution also provided that the alterations and amendments therein should take affect from the first of January, 1839.

At the time of the adoption of the amended constitution, Oristus Collins, the respondent, held and exercised the office of president judge of the second judicial district of Pennsylvania, in

virtue of a commission bearing date August 8, 1836. On the twenty-sixth day of December, 1838, after the adoption of the new constitution, the respondent resigned his commission, as president judge, and, on the next day, was again commissioned to the same office, agreeably to the provisions of the fifth section of the schedule of the amended constitution, and, under this new commission, entered upon the duties of his office.

On the twenty-third day of May, 1839, the attorney general of Pennsylvania suggested the above facts to the supreme court, who thereupon awarded a writ of *quo warranto* against judge Collins, returnable the tenth of June following. On the return of this writ, the respondent appeared, and pleaded that he held and exercised the office in question under the commission above-mentioned of December 27, 1838. To this plea, there was a demurrer and joinder.

The case was argued by the *Attorney General*, and *James Madison Porter*, for the commonwealth, and by *Samuel Parke*, and *Thaddeus Stevens*, for the respondent; and the opinion of the court was delivered as follows, by

KENNEDY, J.—“Under the constitution of 1798 the tenure of the judges of the courts therein specially mentioned was during good behavior. By the amendments, however, as they are called, which were agreed on and proposed by the convention of 1838, and approved by a majority of the electors, who voted on the question whether they should become part of the constitution or not, at the general election in that year, the tenure of the judges of the supreme court was changed to a term of fifteen years; the president judges of the several courts of common pleas, and such other courts of record as were or should be established by law, and all other judges required to be learned in the law to a term of ten years; subject still, however, to the condition of each behaving himself well. And further, instead of being appointed by the governor, as under the constitution of 1790, they are under the amendments to be nominated by the governor, and by and with the consent of the senate appointed and commissioned by him. By the second section in the schedule, which forms

part of the amendments, it is declared, that the alterations and amendments shall take effect from the first day of January eighteen hundred and thirty-nine, and though it is declared by the third section of the schedule, that the clauses, sections and articles of the constitution of 1790, which still remain unaltered, shall continue to be construed, and have effect as if the said constitution had not been amended, yet the judicial tenure being expressly altered by the amendments, the constitution of 1790 therefore became null and void as to this particular; and all the judges within the state on the first day of January eighteen hundred and thirty-nine, who then held their offices and commissions under it during good behavior, ceased to be judges, by reason of the tenure whereby they held their offices having become terminated, unless some provision can be found to have been made in the amendments to counteract and prevent this effect. The seventh section of the schedule is the only part of the amendments, then, which contains any provision whatever in relation to this point, that can by any possible construction be made to apply to the defendant's case. It is in the following words: "The commissions of the president judges of the several judicial districts, and the associate law judges of the first judicial district, shall expire as follows: The commissions of one half of those who shall have held their offices ten years or more, *at the adoption* of the amendments to the constitution, shall expire on the twenty-seventh day of February, one thousand eight hundred and thirty-nine: the commissions of the other half of those who shall have held their offices ten years or more, *at the adoption* of the amendments to the constitution, shall expire on the twenty-seventh day of February one thousand eight hundred and forty-two, the first half to embrace those whose commissions shall bear the oldest date. The commissions of all the remaining judges, who shall not have held their offices for ten years at the adoption of the amendments to the constitution, shall expire on the twenty-seventh day of February next after the end of ten years from the date of their commissions." All the judges mentioned in this section have their commissions, which were granted under the authority of

the constitution of 1790, extended by necessary implication beyond the first day of January one thousand eight hundred and thirty-nine, when otherwise they would have been determined; some to the twenty-seventh day of February one thousand eight hundred and thirty-nine, some to the twenty-seventh day of February one thousand eight hundred and forty-two; and the rest to the twenty-seventh day of February next after the end of ten years from the date of their commissions. Now, according to the plain reading of this section, it would seem as if no commissions were provided for or continued in force by it, excepting such as were in being at the adoption of the amendments to the constitution. Hence it becomes necessary to examine and ascertain, in the first place, at what time the amendments must be considered as having been adopted agreeably to the meaning of the phrase, "at the adoption of the amendments of the constitution;" or at least to see whether the commission of the defendant was in being, at or before the latest point of time, at which the adoption of the amendments to the constitution must be considered as having taken place. The counsel for the defendant, aware of the important bearing which the answer to this question would have upon their client's case, endeavored to show that it must be taken to mean the first day of January one thousand eight hundred and thirty-nine, otherwise the amendments would have a most unreasonable, unjust and oppressive operation. It was alleged that it was reasonable, if not necessary, to suppose that the convention, as often as they have, in the amendments, referred to the time, when they should be adopted, by mentioning it in the same manner already stated, that they meant to designate the same point of time throughout. And if so, that it is clear from the ninth section of the first article, that the time of the amendments being agreed to finally by the convention, as was first suggested by the counsel for the commonwealth, cannot be the time that was intended; because in speaking there of the senators who shall "be elected at the first general election after the adoption of the amendments to the constitution," it would seem, by taking the whole of the section into view, that the gen-

eral election of eighteen hundred and thirty-nine was intended to be designated, and not the general election of eighteen hundred and thirty-eight, which was the first election, that was to be held after the amendments were agreed to by the convention. So again by the tenth section of the sixth article, it is declared, that "any person who shall after the adoption of the amendments proposed by this convention to the constitution, fight a duel or send a challenge for that purpose, or be aider or abettor in fighting a duel, shall be deprived of the right of holding any office of honor or profit in this state, and shall be punished otherwise in such manner as is or may be prescribed by law." Here it is first said that the convention have, in terms, the meaning of which cannot be mistaken, shown most clearly that they did not consider their agreeing on the amendments as the adoption of them, but merely a proposing of them to the people, for them to decide whether they should be adopted or not. And further, from the terms of this section, it is argued, that the convention could not have intended, that a citizen should be disfranchised for fighting a duel or sending a challenge for that purpose or for aiding or abetting therein, before it was possible for him to know that there was any law or rule of civil conduct in force imposing such a penalty; that such a principle would savor of the highest degree of oppression and injustice. Then, in order to avoid such injustice, the amendments cannot be considered as having been adopted, until after the result of the vote given in regard to them by the electors at the general election, in October, 1838, became publicly known. But this result was and could not be accurately ascertained and known before the eleventh day of December next thereafter, when the speaker of the senate, in conformity to the act of assembly passed in this behalf, ascertained it from the returns thereof, made by judges of the general election, from the several counties of the state. Then again it is still further maintained, that the bare ascertainment of the vote of the electors, approving the amendments proposed by the convention, cannot with any color of propriety be regarded as the adoption of the amendments; that it could, at most, only amount to a promulga-



tion of the vote given thereon; so that the citizens throughout the state might become informed thereof before the first day of January eighteen hundred and thirty-nine, when the amendments, according to the express declaration contained in the second section of the schedule, were to take effect. This, therefore, as is contended by the counsel for the defendant, must be taken to be the time of the adoption of the amendments to the constitution; that at this time, and not before, it may be said with propriety, as well as justice, that they were adopted and received into the family of the constitution and became as it were members or constituent parts thereof; that the general election in October eighteen hundred and thirty eight, being the time when the people by their vote approved of the amendments, may very properly be regarded as the time when they by their vote then given agreed merely, that the amendments should be received into and adopted as constituent parts of the constitution on the first day of January, 1839; that the agreement to adopt may very well be distinguished from the act of adoption; and consequently they may and in some instances must be considered as taking place at different times. And thus, it appears, as it is contended, that by the taking the first day of January eighteen hundred and thirty-nine, as the time of the adoption of the amendments to the constitution, this phrase is not only rendered uniform in its meaning, and made to designate and refer to the same point of time throughout the amendments, as often as it is used, but the whole becomes thereby consistent and harmonious in all its parts; and at the same time perfectly rational, and certainly more just in its operation.

This course of reasoning is plausible, and not without much force; but still when we come to look throughout the amendments, and discover that the convention, seemingly, when they intended to make the first day of January eighteen hundred and thirty-nine the time at which any thing therein provided for should take place, or be looked to, as the point of time in order to ascertain the then existing state of that which was intended to be provided for, have designated, or mentioned it in express

terms ; as for instance, in the sixth section of the schedule, they have said, "the commissions of the judges of the supreme court, who may be in office on the first day of January next, (1839) shall expire in the following manner, &c ;" and seeing that the convention, in the section immediately following, while still engaged in making further provisions, on the same subject, with a like view, that is, for continuing the judicial tenures created under the authority of the constitution of 1790, have changed entirely this manner of expression, for the purpose of designating the particular point of time, to which they intended to refer, in order to describe the commissions of the judges, that were therein intended to be provided for, so as to prevent their being driven, at once, from their offices, without allowing them, some little time, at least, to prepare for meeting the event, is powerful, if not conclusive evidence, to show that they intended by the change in the seventh section, in substituting the expression "at the adoption of the amendments to the constitution," for that of "on the first day of January next," to make the time different, for the classification of the judges, mentioned in the latter section, from that mentioned in the former ; it seems impossible, even by force of the most lively imagination, to come to the conclusion, that the convention could have intended to refer to the same point of time, by using these two different modes of expression. If it plainly appeared, that they were used elsewhere, in the amendments, as synonymous, it might furnish some ground for believing that they were possibly intended to be used as meaning the same thing in this instance also, but there is not the slightest indication of the kind to be met with. It is utterly impossible, then, that the convention could have intended to refer to the first day of January, 1839, by using each of these two modes of expression, as they have done, in these sixth and seventh sections of the schedule, without supposing that they intended to create doubt and confusion, which cannot be imputed to them. Neither can it be supposed, or believed, that a body so conversant with the English language and its synonyms could have used the two expressions, believing that they would be taken and understood to mean each the first day of January, then next following, 1839.

But it has been said, that the course of reasoning adopted and the observations made by chief justice Marshall, in *Owings v. Speed*, 5 Wheaton, 420, have a bearing on this case, and go to show that the commission of the defendant is still in force, and that he is entitled to hold the office of president judge under it. I am compelled, however, if it be so, to say that I am unable to discover it. So far, however, as it is possible to apply what is there said, to the case before us, it appears to have a directly opposite tendency, and goes to prove that the time of the adoption of the constitution of the United States was anterior to the time of its coming into effect. The chief justice pronounces the ratification of it by nine states, that is, their agreement to accept of it, the adoption of it by them, which was in 1788, though it did not, as he shows, take effect or come into operation until the first Wednesday of March, 1789. So far, therefore, as this has any bearing on the present case, it is to corroborate and strengthen what has been contended for, on behalf of the commonwealth, that the vote of the majority of the electors, in relation to the amendments, who voted on that question at the general election, on the 9th of October, 1838, being in favor of the amendments to the constitution, was an adoption of them, and therefore that day ought to be recorded as the time of their adoption, though they were not, according to the provision contained in the second section of the schedule, to take effect till the first day of January, one thousand eight hundred and thirty-nine. Chief justice Marshall also shows that, though the constitution of the United States was an entire new instrument, so that when it came into full operation it superseded every thing of the kind that existed previously, yet certain things were done under the direction of the convention that formed it, before it came into effect, as preparatory to its coming into operation, on the first Wednesday of March, 1789. For instance, the old congress, under the authority thus given, fixed the day on which the electors of president, and vice president, should be appointed, and again the day on which these electors should meet in their respective states, and vote for president and vice president, all which was done under

the authority of a schedule, as it might be called, which accompanied the constitution and its ratification by the states, before the first Wednesday of March, 1789, which, as it was held in that case, was the time at which it first came into operation ; so that the doctrine of *Owings v. Speed* would seem to sanction the principle, and especially in case of amendments to a constitution already in operation, that some parts thereof, according to their special import, might come into operation before the time fixed for their taking effect generally. It has also been contended by the defendant that the constitution of 1790 still remains in full force, and never ceased for a moment to operate, so far as it has not been altered or set aside by the amendments. This position is certainly true ; but it is difficult to perceive how the defendant can derive any aid from it ; because the judicial tenure, prescribed by the constitution of 1790, under which he received his commission, is changed, and therefore annulled, as may be seen in the most explicit terms, by the amendments. The amendment, relating to the appointment and tenure of the judges, is in these words : “ The judges of the supreme court, of the several courts of common pleas, and of such other courts of record as are or shall be established by law, shall be nominated by the governor, and by and with the consent of the senate appointed and commissioned by him. The judges of the supreme court shall hold their offices for the term of fifteen years, if they shall so long behave themselves well. The president judges of the several courts of common pleas, and of such other courts of record as are or shall be established by law, and all other judges required to be learned in the law, shall hold their offices for the terms of ten years, if they shall so long behave themselves well ; ” thus altering, as we see, the constitution of 1790, which authorized the governor alone to appoint and commission the judges of all these courts, and which also declared expressly that they should hold their offices during good behavior.

According to the second article of the schedule, this alteration took effect and came into operation on the first day of January, 1839. This section declares that “ the alterations and amend-

ments in the said constitution shall take effect from the first day of January, 1839 ;" and would certainly have annulled the commissions and tenures of all the judges then within the state, as has been shown before, had it not been for the subsequent provisions contained in the sixth and seventh sections of the schedule, which have been recited above. It seems impossible to escape from this conclusion, unless it can be shown that the amendments, without these two last mentioned sections of the schedule, would not have affected, at all, the right of the judges, in commission on the first day of January, 1839, under the constitution of 1790, to hold their offices during good behavior; but that they would have continued to hold their offices, in the same manner as if the amendments had not been adopted. If this could be shown, then if the defendant be not embraced within the seventh section of the schedule, he would be entitled to hold the office which he claims, not merely for the term of ten years from the date of his commission, but for ever, if he behaved himself well. Such construction, however, were it to be given, would strike every one with amazement, because it would not only be most palpably repugnant to the plain letter and meaning of the amendments, but also directly contrary to the whole scope and tenor of them. Under this view we have come to the conclusion, that the convention, in using the expression "at the adoption of the amendments to the constitution," could not have intended to refer to a later point of time, than the day when the result of the vote of the electors thereon was to be ascertained and made known by the speaker of the senate, from the official returns thereof; and it may be that an earlier point of time was intended; but according to our construction of the amendments, as regards the main question before us, it is not material, whether an earlier day was intended or not. The speaker of the senate on the eleventh day of December, eighteen hundred and thirty-eight, under the authority conferred on him for that purpose, publicly declared that the amendments had been approved by a majority of the electors at the preceding general election, who had voted thereon. Then, after they had thus been adopted and so declared, and before the

first day of January eighteen hundred and thirty-nine, when they were to take effect, the defendant, on the twenty-seventh day of December eighteen hundred and thirty-eight, was commissioned president judge of the second judicial district, during good behavior, by the governor, under the authority of the constitution of 1790. This authority of the governor, however, as also the right to hold the office under the commission so granted, ceased on the first day of January, eighteen hundred and thirty-nine, by operation of the amendments, which took effect on that day, unless extended beyond that time by the seventh section of the schedule recited above; but upon a fair construction of this section, it would seem difficult, if not almost impossible, to bring the commission of the defendant within its provisions. It is clear that it refers only to commissions which were in force "at the adoption of the amendments to the constitution," and was not intended to embrace any others. Why it was so limited in its provisions cannot perhaps be very satisfactorily explained, from any thing that appears on the face of the amendments themselves; nor is it requisite that any good reason should appear or be given for it, as long as it has become part of the constitution by the will of the people. The caption of the seventh section doubtless included, as has been said, all the president judges of the several judicial districts and the associate law judges of the first judicial district within the state. And if there had been no reference in the subsequent clauses of the section to the time at which it was designed they should be classed, and for this purpose designated, it would have been natural and perfectly fair, to have brought in aid of giving a proper construction to it the second section of the schedule, which declares that the amendments shall take effect on the first day of January, 1839, for the purpose of designating the time intended for distributing the judges, mentioned in the seventh section, into their proper classes. In this way, the present commission of the defendant would have been included and its force extended to a period of ten years from its date. But the subsequent clauses of the seventh section, which embrace and class all the judges mentioned in the caption of the

section, fix the time expressly at which they shall be classed, and make it the time of the adoption of the amendments to the constitution, by declaring that the commissions of one half of those, who shall have held their offices ten years or more at the adoption of the amendment to the constitution, shall expire on the twenty-seventh day of February eighteen hundred and thirty-nine; that the commissions of the other half of those, who shall have held their offices, ten years or more at the adoption of the amendments to the constitution, shall expire on the twenty-seventh day of February, eighteen hundred and forty-two; the first half to embrace those whose commissions shall bear the oldest date; that the commissions of all the remaining judges, that is, the rest of all those, who were first mentioned, without doubt, in the beginning of the section, who shall not have held their offices for ten years at the adoption of the amendments to the constitution, (thus not only meaning but declaring plainly by necessary implication, that the commissions of all of those, who shall not have held their offices, that is, who shall have held them for less than ten years, at the adoption of the amendments to the constitution,) shall expire on the twenty-seventh day of February next after the end of ten years from the date of their commissions. But how can it, with propriety, be made to include those who did not hold their offices at the adoption of the amendments, but commenced holding them subsequently thereto? It would seem not to be susceptible of any other construction, without doing violence to what appears to be its true grammatical construction, as well as that which arises from its context. The only judges mentioned in this section are those of whom it can now be predicated that they either had or had not then held their offices ten years, that is, at the time of the adoption of the amendments. But such predicate, naturally at least, if not necessarily, implies, that the judges, who are its subject, should then be in being and holding their offices as such. It is not pretended that judge Collins, under his last commission, the only one that is claimed to be in force, can come within either class of the first division: and it is equally clear that he cannot be brought within the second: because a president

judge, to come within the latter, as well as he former, must, in order to meet the plain, unambiguous terms of the section, have had his commission, and held his office under it, at the time of, if nor before, the adoption of the amendments.

Then in order to show and illustrate the meaning of the convention, in the last clause of the section, embracing the "commissions of all the remaining judges, who shall not have held their offices for ten years, at the adoption of the amendments to the constitution," which form the third class and the only one that the defendant can possibly claim to be included in; let us suppose that a president judge were to say, "I had not held my office ten years at the adoption of the amendments;" would not all who heard him naturally and necessarily infer, and correctly too, from his form of speech, that he held his office at the time of the adoption, but the ten years had not then expired. But if the fact were so, that he did not hold it then, but obtained it after the adoption, would he not be taken to have spoken untruly? And if, upon being called upon afterwards, to explain why he said so, he were to attempt to vindicate the truth of his assertion, by alleging that as he did not hold the office at all then, but came into it under a commission granted to him subsequently, and therefore what he said were literally true, would it not be considered a mere subterfuge? These are questions which seem to admit of no other than affirmative answers. Then for any one to assert now that judge Collins had not held his office under his second commission ten years, at the adoption of the amendments, would be asserting plainly by implication, that he then held his office under it, but had not held it so long as ten years; this, however, would surely be incorrect, as he did not then hold the office at all under it, it being granted to him subsequently. The words in the last clause of the seventh section of the schedule, "who shall not have held their office for ten years at the adoption of the amendments," seem to indicate so clearly the intention of the convention, to provide only for those who should be in office at that time, without having held their offices for ten years, that it seems almost impossible even to imagine that they would have used



such form of speech unless such was their intention. Then, if it were the intention of the convention, as it seems to have been, that no appointment of a president judge of any of the courts of common pleas, made by the governor, between the adoption of the amendments to the constitution, and the first day of January, 1839, should endure longer than to this latter day, it is nothing but right, in a legal point of view, that he who has been so appointed should then give up the office ; so that it may be filled again, either by himself or another, nominated by the governor, and by and with the consent of the senate appointed and commissioned by the governor for that purpose. Believing this to have been the meaning and intention of the convention, as collected from a fair interpretation of the language and terms in which the amendments are drawn up, we consider ourselves bound to carry the amendments into effect according to such intention, let the result of their operation be what it may, whether for the better or the worse, as forming part of the constitution and paramount law of the state. My own prejudice, however, is certainly not in their favor. I have no hesitation in pronouncing them the product of a delusion, that has been the ruin of nations in times past, quite as wise, intelligent, and virtuous, at one period of their existence, as we have any right to claim to be. But as long as it belongs to every succeeding generation or nation, always to think itself more enlightened, and more wise, and therefore more capable of governing itself, than any that has gone before it, in such manner as most effectually to promote and secure individual as well as national happiness, by leaving or placing every one in the full enjoyment and exercise of all his natural rights, without imposing any restriction upon them whatever, it is not to be wondered at that we should, under the influence of a most inflated and vain confidence in our own superior wisdom and discretion, disregard the warnings which might be derived from the experience and sad fate of those, who from the same kind of illusory confidence in their superiority lost every thing, and became, as it were, entirely extinct among the nations of the earth ; and blindly and most heedlessly run on, in precisely the

same fatal course that led to their degradation and ruin. It would seem as if the empty pride and incorrigible vanity of our nature was, without fail, either sooner or later to consign us to some such unhappy destiny, as ever ought to be deprecated. Seeing then, the commission, under which judge Collins claims to hold the office of president judge of the second judicial district, being granted subsequently to the adoption of the amendments, and consequently, as has been shown, not embraced nor its force extended by the seventh section of the schedule, nor by any other part of the amendments, became null, void, and of no effect whatever, on the first day of January, eighteen hundred and thirty-nine. Judgment of ouster must therefore be rendered against him. It is considered by the court here, that the said Oristus Collins, Esq. do not, in any manner, intermeddle or concern himself in and about the holding of, or exercising, the said office of president judge of the said second judicial district within this commonwealth, composed of the county of Lancaster, in the said information specified, in virtue of the supposed commission by him mentioned in his plea in bar aforesaid :—but that the said Oristus Collins, Esq. be absolutely forejudged and excluded from holding or exercising the same office, and that the said commonwealth recover costs taxed at, &c.

## LEGISLATION.

**ALABAMA.** The general assembly of this state, at the last session thereof, held in the months of December, 1838, and January and February, 1839, passed one hundred and thirty-three general and one hundred and twenty-one special laws, and sundry joint resolutions. The general laws contain an unusual number of provisions of general interest.

*Evidence of account.* In suits upon accounts for sums not exceeding one hundred dollars, the plaintiff's oath is made evidence, unless controverted by the oath of the defendant, except in cases where the latter is sued as executor, administrator, trustee or guardian. No. 27.

*Suits by partners.* Where a plaintiff brings suit as a firm or copartnership, proof is not to be required, that the individuals named as plaintiffs constitute the members of the firm, unless the defendant puts the same in issue by a plea in abatement. No. 27.

*Chancery.* The state is divided into six chancery districts, the first, second and third of which constitute the southern and the remaining three the northern chancery division, for each of which divisions, a chancellor is to be chosen by the joint vote of the general assembly, for the term of six years. The chancery jurisdiction heretofore exercised by the judges of the circuit courts is withdrawn from them and conferred on the courts so constituted. The judges of the supreme and circuit courts are authorized, however, to issue writs of *injunction* and *ne exeat*, returnable before the chancellors. No. 34.

*Penitentiary.* A general penitentiary and prison is authorized to be built, under the superintendence of three commissioners, at some place not exceeding fifty miles from the centre of the state,

for the reformation and punishment of offenders sentenced to imprisonment and hard labor. The commissioners are to be chosen and the place selected by the general assembly. No. 39.

*Criminal laws.* The same statute requires the appointment, by the general assembly, of three persons, to prepare and submit to the next session of the legislature a code of criminal laws adapted to the penitentiary system of punishment, and a set of rules for the organization and government of the penitentiary.

*Concealed weapons.* The carrying concealed about the person of any kind of fire-arms, bowie-knife, Arkansas tooth-pick, or any other knife of the like kind, or of any dirk or other deadly weapon, is made punishable by a fine of not less than fifty or more than five hundred dollars, to be determined by the jury. No. 77.

*Sureties.* Where one of several co-sureties is sued, he is authorized to notify his co-sureties of the suit, and the court, upon proof of such notice, and that the party notified is surety, is required to enter up judgment in favor of the surety sued against his co-surety so notified, for the proportion of the debt, which the latter ought to pay. No. 82.

*Imprisonment for debt* is abolished, except where the plaintiff or his agent makes oath, that the debtor is about to abscond, or has fraudulently conveyed or is about to convey fraudulently his estate or effects, or has money liable to satisfy the debt, which he fraudulently withholds, in all which cases the body of the debtor may be arrested. No. 89.

*Dower.* A married woman, by joining with her husband in the execution of any deed of conveyance of lands, &c, in the presence of two or more credible witnesses, or acknowledging the execution of the same, before any person competent to take the acknowledgment, may bar her right of dower in the estate so conveyed. No. 84.

*Counsellors and attorneys at law* from other states may be licensed to practise law in this state, without a previous examination, by applying to the supreme court, and producing evidence of good moral character, and that they are licensed to practise law in the highest courts of some other state. No. 85.

**Seals.** All covenants, conveyances, and contracts in writing, which import on their face to be under seal, are to be considered as sealed instruments, whether a seal be affixed thereto or not, or whether there be a scrawl to the name or not. No. 94.

**Slander.** All words spoken and published of any female, falsely and maliciously imputing to such female a want of chastity, are made actionable in themselves, without proof of special damage. No. 87.

**Mechanics.** The mechanics of Mobile are authorized to retain all articles made or repaired by them in their shops, until paid therefor ; and, in default of payment for five days, to cause the same to be sold at public auction, after ten days' notice.

**KENTUCKY.** The general assembly of Kentucky, at the session thereof, which terminated in February last, passed four hundred and sixty-nine statutes, nearly all of which are of a private or local character.

**Legacies and devises** to children and grand-children shall not lapse by the death of the legatee or devisee before the testator ; provided such legatee or devisee have children living at the testator's death, who would have taken as heirs by descent, or as distributees of the legatee or devisee. Chap. 1019.

**Lien on steamboats.** All the officers of steamboats, (except the captain) also the firemen, and owners of firemen, together with the mariners, and other hands, on all steamboats within the state, shall have a lien for their wages on the boat, her engine, tackle, and furniture, and a preference over any and all other debts due from the owners ; and steamboats, built, repaired, and equipped within the state, shall be liable for all debts contracted by the master, owner, or consignee, on account of work, supplies, or materials furnished by mechanics, tradesmen and others, for and on account of or towards the building, repairing, fitting, furnishing, or equipping, such steamboats, their engine, tackle or furniture, and shall have preference over any and all other debts due from the owners, except the wages due the officers and crew ; and every steamboat coming within the state, indebted on account of

work done, supplies, or materials furnished by mechanics, tradesmen and others, for or on account of or towards the building, repairing, fitting, furnishing, or equipping such steamboat, or engine, tackle, or furniture, shall be liable for the same, and the proceedings on all these liabilities shall be *in rem*. Chap. 1088, § 1.

The second and third sections of the same statute provide for the remedy and the proceedings in the cases specified in the first.

The third section gives a remedy *in rem* against steamboats for injuries to other steamboats, flat boats, and other craft, in consequence of trespass or negligence.

The fifth section provides, that the liens given by the act shall not be enforced against a purchaser without actual notice, unless suit is instituted within a year from the accrual of the cause of action.

*Reversionary legatees.* Persons having a life-estate in slaves are required to file the names of such slaves with their ages, once in every year, in the clerk's office of the county within which they reside, to be recorded therein. Chap. 1174.

*Duel.* When any person shall be killed in a duel, either within or without the state, and shall leave a wife and minor children, or either of them, the latter may have an action of trespass against the principal, and all concerned, in the duel; in which action, the jury is authorized to give vindictive damages. Any of the parties concerned in the duel may be left out of the writ, and used as witnesses. Chap. 1214.

*Attachments and absconding debtors.* All the laws on these subjects are reduced into one. Chap. 1294.

LOUISIANA. The fourteenth legislature of this state, at the first session thereof, held in the months of January, February, and March last, passed sixty-eight statutes, and several joint resolutions. Among these legislative proceedings, we find very little of general interest.

*Commercial court of New Orleans.* A court by this name is established, to be held by one judge, at such place within the city of New Orleans, as he shall appoint. The salary of the judge is

fixed at five thousand dollars. This court is to have concurrent jurisdiction with the parish court of the parish and city of New Orleans, except in certain enumerated cases. No. 17.

*Betting on elections* is prohibited under the penalty of not less than the amount or value staked, nor more than double the same. No. 39.

*Code of practice.* The governor is authorized to purchase five hundred copies of the new edition of the code of practice, proposed to be published by E. Johns & Co., at a price not exceeding six dollars a copy ; provided he shall be satisfied with the manner of the execution of the work. No. 52.

The code of practice is also amended in several particulars. No. 53.

**RHODE ISLAND.** A pamphlet before us contains the public laws of the "state of Rhode Island and Providence plantations," passed since January, 1837, and including February, 1839. The most important of these is the "act concerning

*Crimes and punishments*," passed February 3, 1838, which, in eleven chapters, embraces the whole statute law on the subject of crimes and punishments. It cannot be called a penal code, inasmuch as it contains but a part of the criminal law. The definitions of the several offences made punishable thereby must still be sought in the vast abyss of the common law ; and it is further expressly provided, that every act or omission, which is an offence at common law, and for which no punishment is provided by the act, may be prosecuted and punished as an offence at common law ; but, in all such cases, the punishment, when by imprisonment, must be for less than a year, and, when by fine, cannot exceed one thousand dollars.

This statute is the same, without any material alteration, we believe, which was reported by commissioners appointed to revise the penal code of Rhode Island, and adapt it to penitentiary punishments, whose labors we noticed in our nineteenth volume. The penal code of Rhode Island provides the punishment of death only in the case of murder.

**MARYLAND.** The general assembly of this state, at their last session, which commenced December 30, 1838, and terminated April 6, 1839, passed four hundred and eighteen statutes, and eighty-five resolutions.

*Power of attorney.* One partner is authorized to make and seal, in the name of the partnership, a power of attorney to transfer stock standing in the name of the firm. The instrument must be acknowledged. Chap. 49.

*Fugitive slaves.* The escape of a slave out of the state, is made punishable, as a felony. Chap. 63.

*Slander.* All words spoken maliciously touching the character or reputation for chastity of any female (if a married woman, spoken subsequent to the marriage, and in relation to her character previous thereto) and tending to the injury thereof, are to be deemed slanderous, and treated as such. Chap. 114.

*Mechanic's lien.* Every building erected within the city of Baltimore is subjected to a lien for the payment of all debts contracted for work done, or materials furnished for or about the erection or construction of the same. Chap. 205.

*Manufacturing and mining corporations.* By the first section of chapter 267, it is provided, that all companies thereafter incorporated for the purposes of manufacturing, or for the purposes of exploring and mining for gold, coal, copper, iron, or other minerals, shall be established with the rights and privileges, and under the rules, regulations and restrictions contained in the act. The subsequent sections set forth the rules and regulations referred to.

*Physicians.* An act "to authorize the Thomsonians or botanic physicians to charge and receive compensation for their services and medicine," provides, that every citizen of the state may charge and receive compensation for his services and medicines, in the same manner as physicians are authorized to do. Chap. 261.

*Betting on elections* is prohibited under a penalty of not less than fifty or more than five hundred dollars. Chap. 392.

*Constitution.* An amendment of the constitution is proposed, which provides that all future sessions of the general assembly



shall close on the tenth day of March in each year, or sooner. Chap. 411.

*Revised laws.* A resolution, passed March 5, 1839, authorizes the treasurer of the western shore to subscribe for one thousand copies of the revised code of laws, "proposed to be published" by the Hon. Clement Dorsey, at ten dollars a copy; "provided the work shall be approved of by two persons, to be designated by the governor, without any expense to the state for such revision, or examination, and also that the work shall be published and printed in chronological order, with a copious index, including the public statutory law of the state, with the public local law appended thereto, and arranged among the counties in alphabetical order." No. 28.

NEW YORK. The legislature of this state, at the 62d session thereof, begun and held in January 1839, passed three hundred and ninety statutes, very few of which are of a public or general character.

*Apothecaries in the city of New York.* No person is allowed to commence or practise, in the city of New York, the business of an apothecary, or that of preparing and dispensing medicine, or of preparing or putting up physicians' prescriptions, without previously obtaining a diploma from the college of pharmacy of the city of New York, or from some other regularly constituted school of pharmacy or medicine, or a certificate of his qualifications for the business of an apothecary, from the censors of the medical society of some county in the state. Chap. 67.

*Speed of steamboats.* If the captain or person in charge of any steamboat, navigating any waters within the jurisdiction of the state, and used for the conveyance of passengers, or if the engineer or other person, in charge of the boiler of such boat, or of any other apparatus for the generation of steam, shall, for the purpose of excelling any other boat in speed, or for the purpose of increasing the speed of such boat, create or allow to be created an undue or an unsafe quantity of steam, every such captain, engineer, or other person, shall be deemed guilty of a misde-

meanor, and, for such offence, forfeit the sum of five hundred dollars. Chap. 175.

*Duties of judges.* No judge shall directly or indirectly take any part in the decision of any cause or question, which shall be brought or defended in the court of which he is a judge, by any person with whom he shall be interested or connected as a partner in any other court. Chap. 303.

*Chancery proceedings.* An act passed April 18, 1838, "to regulate the trial by jury and the taking of testimony in chancery," of which we gave an abstract in our last October number, (vol. xx, p. 196), is repealed, and provision made to effect the same general objects, in a somewhat different manner, by chapter 317.

*Fugitives from justice.* This subject is one of so general importance, that we publish the statute (chap. 350,) at length :

§ 1. The officers, respectively specified in section first of title second of chapter second of part fourth of the revised statutes, shall have power to issue process for the apprehension of a person charged in any other state or territory of the United States with treason, felony or other crime, who shall flee from justice and be found within this state.

§ 2. The proceedings shall be in all respects similar to those under title second, chapter second, part fourth of the revised statutes, for the arrest and commitment of persons committing offences within this state.

§ 3. If, from such examination, it shall satisfactorily appear, that such person has committed a criminal offence and is a fugitive from justice, such magistrate by warrant, reciting the accusation, shall commit such fugitive from justice to the common jail, there to be detained, for such time to be specified in said warrant, as the said magistrate shall deem reasonable to enable such fugitive to be arrested, by virtue of the warrant of the executive of this state, issued according to the act of congress, upon the requisition of the executive authority of the state or territory in which such fugitive committed such offence, unless such person shall give bail as this act is provided for, or until he shall be discharged according to law.

§ 4. The person thus arrested may give bail in such sum as by the magistrate shall be deemed proper ; conditioned that he will appear before the said magistrate, at such time as to the said magistrate shall seem reasonable, and will deliver himself up to be arrested upon the warrant of the executive of this state.

§ 5. The magistrate, before whom such person shall have been examined and committed, shall immediately cause written notice to be given to the district attorney of the county where such commitment takes place, of the name of such person and the cause of his arrest ; the said district attorney, shall immediately thereafter cause notice to be given to the governor of the state or territory, or to the state's attorney, or to the presiding judge of the criminal courts of the city or county of the state or territory having jurisdiction of the offence so charged to have been committed by such person, to the end that a demand in pursuance of the act of congress may be made for the arrest and surrender of said person.

§ 6. The person thus arrested, detained or bailed, shall be discharged from such detention or bail, unless at or before the expiration of the time designated in the warrant of commitment, or in the condition of the bail-bond, he shall be demanded or arrested by such warrant of the executive of this state.

§ 7. It shall be the duty of the magistrate to make return to the next court of general sessions of the peace of the county of his proceedings in the premises ; it shall be the duty of the said court of sessions to inquire into the cause of the arrest and detention of such person ; and if such person is in custody, or the time for his arrest as designated in the condition of the bail-bond has not elapsed, the said court of sessions in its discretion may discharge the said person from detention, or may order the said bail-bond to be canceled, or may continue his detention for a period beyond the time specified in the warrant of commitment, or may order new bail to be given, conditioned for the surrender of the said person at a time, shorter or longer than the time designated in the bail-bond taken by the said magistrate ; and if said person is in custody, may take bail, conditioned for his appearance

before said court, to be surrendered at such time as to said court may seem reasonable and proper.

§ 8. The governor of this state shall transmit a copy of this law to the executive of each of the states of the union, to the end, that reciprocal laws may be enacted by such states.

§ 9. This act shall take effect upon the passage thereof.

*Seventh-day baptists.* The service of any process or proceeding upon the seventh day of the week, commonly called Saturday, by or upon any person whose religious faith and practice it is to keep that day as the sabbath, is made void, except in cases of breach of the peace, or apprehension of persons charged with crimes and misdemeanors; and all such persons are exempted from the performance of military duty on that day, except in cases of invasion, insurrection, or in time of war. Chap. 368.

NEW JERSEY. Among the acts passed by the sixty-third general assembly of this state, at the first and second sitting thereof, the latter of which terminated in March last, we find two of considerable importance.

*Crimes and punishments.* An act, supplementary to "an act for the punishment of crimes," contains provisions relating to murder and sundry other offences of an aggravated character.

All murder perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or committed in perpetrating or attempting to perpetrate arson, rape, sodomy, robbery or burglary, shall be deemed murder of the first degree; all other kinds of murder shall be deemed murder of the second degree; and the jury shall determine whether the offence be murder of the first or of the second degree. The punishment of murder in the first degree is death; that of murder in the second degree is imprisonment at hard labor for any term not less than five nor more than twenty years. March 7, 1839.

*Elections.* The whole law of elections is revised in a statute passed March 12, 1839, consisting of one hundred and eighteen sections.

**MAINE.** The public acts of Maine, passed by the nineteenth legislature thereof, at its session held in January last, are fifty-eight in number. The same legislature passed seventy-two private and local statutes, and one hundred and twenty-six resolutions.

*Exemptions from attachment.* Anthracite and bituminous coals, not exceeding five tons or chaldrons, and charcoal, not exceeding fifty bushels, conveyed to the house of any person for the use of himself and family, are exempted from attachment, execution, and distress. Chap. 358.

*Limitation of criminal prosecutions.* No person shall be prosecuted, tried, or punished for any crime except murder, manslaughter, treason and arson, unless the indictment for the same is found within six years next after the commission of the offence. Chap. 362.

*Trial of divorces.* In cases of libel for divorce from the bonds of matrimony, either party may have the question tried by a jury. Chap. 377.

*Days of grace.* Where bills of exchange, drafts, or promissory notes, discounted at any bank, or left at any bank for collection, fall due on the fourth day of July (that being the last day of grace) the same are declared to be payable on the day preceding, and, in case of nonpayment, may be protested accordingly; but, when the fourth of July falls on a Monday, such bills &c., are payable and may be protested for nonpayment on the next Tuesday. Chap. 386.

*Mortgages of personal property.* Where the debt secured by a mortgage of personal property exceeds thirty dollars, the mortgage must be recorded by the clerk of the town, city, or plantation, where the mortgagor resides, or possession of the mortgaged property must be delivered to and retained by the mortgagee; otherwise the mortgage will be valid only between the parties thereto. This provision is not to affect any contract of bottomry or respondentia, or any transfer, assignment, or hypothecation of any ship or goods, at sea or abroad, provided the mortgagee takes possession of the same, as soon as may be after their arrival within the state. Chap. 390.

*Discrepancy between the title and body of an act.* A statute, bearing the title of "an act in addition to an act providing for the government of the state prison and for punishment of convicts," authorizes the governor and council, if they deem it necessary, "to change the present organized militia company into a company of riflemen, and to increase the number to sixty persons, subject to the same duties, liabilities, restrictions and penalties, as the present company now are." This is the whole of the act. What connection it has with the "government of the state prison" and the "punishment of convicts," is not quite so obvious to us, as it probably was to the legislature of Maine.

**ILLINOIS.** The eleventh general assembly of this state, at the last session thereof, which commenced in December, 1838, and terminated in March, 1839, passed a large number of statutes, chiefly private and local in their character.

*Spirituous Liquors.* An act passed March 2, for "regulating tavern and grocery license," contains a provision, that if a majority of the legal voters in any county, justice's district, incorporated town, or ward in any city, shall petition the county commissioners' court, or other authority for granting licenses, desiring that spirituous liquors shall not be retailed within the bounds of said county, district, or ward, it shall not be lawful to grant any license therein, until a majority of the legal voters thereof shall in like manner petition for the granting of the same.

*Betting on elections* is prohibited under a penalty of not more than one thousand dollars. Feb. 15, 1839.

*Seat of government.* Springfield, in the county of Sangamon, is made the seat of government from and after July 4, 1839. Feb. 21, 1839.

*Public carriages and the law of the road.* An act passed February 23, 1839, to regulate public carriages and the law of the road, contains the following among other provisions :

§ 1. Persons travelling with carriages, and meeting on any turnpike, road, or public highway, are required seasonably to turn their carriages to the right of the centre of the road, so as

to permit their carriages to pass one another without interruption or interference, under a penalty of five dollars for every neglect or offence, provided any injury to persons or property accrue therefrom.

§ 2. No person, owning any carriage running or travelling upon any road for the conveyance of passengers, shall employ, or continue in employment, any person to drive such carriage, who is addicted to drunkenness or the excessive use of spirituous liquors.

§ 3. If any driver, whilst driving any such carriage, shall be guilty of intoxication to such a degree, as to endanger the safety of his passengers, it shall be the duty of the owner of the carriage, on receiving written notice of the fact, signed by any one of the passengers, and certified by him on oath, forthwith to discharge such driver from his employment.

§ 4. No person driving any carriage, upon any turnpike, road, or public highway, with or without passengers therein, shall run his horses or carriage, or permit the same to run, upon any occasion, or for any purpose whatever.

§ 5. It shall not be lawful for the driver of any carriage, used for the purpose of conveying passengers for hire, to leave the horses attached thereto, while passengers remain therein, without first securing the horses, so as to prevent their running.

§ 6. Owners of carriages are made liable jointly and severally, for all injuries and damages done by any person in their employment as a driver.

The above are the principal provisions. Penalties, forms of proceedings, &c., are omitted.

*Possessions and titles of land.* Actual possession of land, under claims and sales of titles made in good faith, and payment of taxes thereon, for seven successive years, constitute a legal ownership, according to the purport of the possessor's paper title. March 2, 1839.

*Suits by assignees.* Suits instituted in the name of one person for the benefit of another, are not to abate by the death of the plaintiff, but may be prosecuted to judgment and execution in

the same manner as if the latter were plaintiff: and persons, for whose use suits are instituted, are to be considered as parties to the proceedings, so far as to authorize judgment against them for costs, and to make them liable for fees, and to allow them to prosecute appeals, &c. March 2, 1839. § 1.

In actions upon instruments made assignable by law, in the name of the assignee, the plaintiff need not prove the assignment or the signature of the assignor, unless the fact of assignment be put in issue by plea, verified by the affidavit of some credible person, stating that he verily believes the facts stated in the plea to be true. Same, § 2.

CONNECTICUT. The general assembly of this state, at the last May session thereof, passed fifty-six general statutes, and several private acts and resolves.

*Constitution.* An amendment relating to the qualifications of electors, which was adopted in 1837 and 1838, in the manner required by the constitution (see American Jurist, vol. xx, p. 195), but was not regularly submitted to, or voted upon, by the people, was directed to be submitted to them for their ratification. The question presented by the facts above stated, being an interesting one, we shall transfer to our columns the report of the committee on the judiciary, in reference to the course adopted by the general assembly.

“In relation to the proposed amendment of the constitution, referred to in the communication of the secretary, it appears that the same was proposed by a vote of a majority of the house of representatives, duly continued and published, and passed at the session of the general assembly then next, by a vote of two thirds of each house, and by the secretary duly transmitted to the town clerks of the several towns. Thus far the provisions of the constitution have been complied with. The constitution, however, requires, that the amendment shall be presented to a town meeting, *“legally warned and held for that purpose.”* It appears, that in relation to a portion of the towns, no vote was taken on the proposed amendment; and in relation to those towns where votes



were taken, it does not appear that the meeting was warned for that purpose ; and if in the case of any town, a meeting were so warned, as there was no provision by law for warning such meeting, the committee are of opinion, the same cannot be considered as having been *legally* warned. They are therefore of opinion, that the votes which have been heretofore given, in the several town meetings, in relation to this amendment, are to be rejected. As, however, there is no provision by the constitution as to the time when any proposed amendment shall be acted upon by the several towns ; and as the legislature is authorized to provide by law the mode of ascertaining whether such amendment has been approved by a majority of the inhabitants of the state, in town meeting legally assembled, the committee are of opinion, that no difficulty exists in providing by law, during the present session of the general assembly, for submitting to the inhabitants of the several towns the said amendment in pursuance of the constitution ; and if the same shall be approved by a majority of the electors present in the several towns, in town meeting, legally warned, they are of opinion that said amendment may be considered as part of the constitution."

*Exemptions from attachment.* Charcoal, not exceeding twenty-five bushels, other coal, not exceeding two tons, and wheat flour, not exceeding two hundred pounds weight, being the property of any one person, having a wife or family, are exempted from attachment, warrant, or execution, for any debt or tax. Chap. 15.

*Registration of electors* is provided for by chap. 19.

*Mechanics' lien.* The lien upon land and buildings, in virtue of existing laws, is extended to the claims of sub-contractors, for labor alone or labor and materials, to the amount of fifty dollars or more, for the period of sixty days after the finishing of the building or termination of the contract. Chap. 29.

*Spirituous liquors.* The several towns, at town meetings legally warned and held for the purpose in the month of January annually, are authorized, by a major vote of the legal voters present, voting by ballot, to grant liberty to any person or persons, to sell wines and spirituuous liquors within their respective towns, under such regulations as they may adopt. And the sale of such

liquors, in any manner contrary to regulations so adopted, or in any town where the sale is prohibited, is made punishable by fine. Chap. 52.

UNITED STATES. The twenty-fifth congress of the United States, at its third session, which terminated March 3, 1839, passed two hundred and forty statutes, and ten joint resolutions. Among the statutes of general interest are : an act concerning duelling and the punishment thereof, in the district of Columbia (chap. 30),—two acts relating to the judiciary (chapters 36 and 81),—an act to provide for taking the sixth census (chap. 86),—and an act in addition to an act to promote the progress of the useful arts (chap. 88.) From the latter we extract some provisions.

*Patents for inventions.* The *sixth* section of the last mentioned statute provides, “ that no person shall be debarred from receiving a patent for any invention or discovery, as provided in the act approved on the fourth day of July, one thousand eight hundred and thirty-six, to which this is additional, by reason of the same having been patented in a foreign country more than six months prior to his application : *Provided*, That the same shall not have been introduced into public and common use, in the United States, prior to the application for such patent : *And provided, also*, That in all cases every such patent shall be limited to the term of fourteen years from the date of publication of such foreign letters patent.”

The *seventh* section of the same statute enacts, that “ every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention ; and no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public ; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent.”

## CRITICAL NOTICES.

1—*Manuel des Consuls*, par ALEX. DE MILTITZ, Chambellan de S. M. le Roi de Prusse, ancien ministre près la Porte Ottomane. Tome I and II, Partie I. Londres et Berlin, A. Asher, 1837.

WE cannot better accomplish our purpose of making this work known to our readers, than by presenting them with some extracts from the author's preface.

"The high utility of foreign consulates was early acknowledged by all the commercial states of Europe. The publicists, however, have given but a passing notice to this institution ; those, who have spoken of it most in detail, have uttered only vague, and frequently even contradictory opinions, concerning the character and attributions of consuls ; the authors of the French and English dictionaries of commerce have furnished articles, more or less imperfect on this subject ; but, nowhere, previous to the end of the eighteenth century, had there been even an attempt made to form a theory of the principles adopted in practice by the different powers, in regard to consuls ;<sup>1</sup> principles, which several of these powers have, nevertheless, expressly sanctioned by laws of regulation or by diplomatic conventions.

"The merit of having first laid the foundation of a theory of the consulate belongs to the late Mr. Steck, counsellor of legation in the department of foreign affairs in Prussia, in his essay on consuls.<sup>2</sup>

<sup>1</sup> The sketch of a discourse on consuls, by J. H. Meissler, Hamburg, 1751, in quarto, scarcely deserves to be mentioned.

<sup>2</sup> *Essai sur les consuls*, par Mr. de Steck, Berlin, 1790, pet. in 8vo.

"This first attempt, which is but a mere sketch, a single stone, so to speak, of the edifice to be built, obtained at the time the unanimous suffrage of all competent judges; and it even now enjoys a sort of authority, which has not been diminished by the later works on the same subject.

"Since the essay of Mr. Steck, two treatises on the origin and successive developments of the consular institution, have been published, one in 1807, by F. Borel,<sup>1</sup> chief of division in the department of commerce, at St. Petersburg, and the other, in 1813, by D. B. Warden,<sup>2</sup> consul-general of the United States of North America, at Paris. The labor of these two writers has been bestowed in part upon good materials; but their researches, whatever other merit they may possess, have produced only partial and very limited results.<sup>3</sup>

"The want of a complete treatise on the origin, development, and actual organization of consular establishments, is still as great as ever. The theory of the consulate remains to be constructed.

"The book, which I present to the public, under the title of the Manual of Consuls, is intended to supply the insufficiency of those which have preceded it. It is particularly destined to the instruction of that very numerous class of consular agents, who have not been qualified by any special studies for the employment which they exercise.

"I have thought proper to choose this point of view, in preference to any other, because, that even now, and notwithstanding the repeated experience of the grave prejudices resulting from it to the interests of commerce, and to the dignity of governments, the practice of making extemporary consuls, (*d'improviser des*

<sup>1</sup> De l'origine et des fonctions des consuls, par F. Borel, St. Petersburg, 1807, in 8vo.

<sup>2</sup> On the origin, nature, progress and influence of consular establishments, by D. B. Warden, Paris, 1813, in 8vo. Translated into French by Bernard Barrère de Morlaix, Paris, 1815, in 8vo.

<sup>3</sup> The work of Borel, though infinitely superior to that of Warden in arrangement and composition, is only a very incomplete sketch.

*consuls*) that is to say, of confiding the exercise of consular functions to merchants, who are frequently ignorant of every thing relating to the office of consul, prevails in the majority of powers.

"The desire of becoming generally useful has naturally determined me to write in that language, which is the most universally diffused.

"In attaching myself to fill up the table so judiciously sketched by Mr. Steck,<sup>1</sup> I have neglected nothing, in order to render my work as complete as possible.

"The first volume treats of the origin and development of the consular jurisdiction, in the interior of the countries, where it has been established;—of the administrative and judicial institutions, created for the benefit of commerce, in place of the consular jurisdiction; and of the commercial and maritime laws.

"The second volume, divided into two parts, sets forth the origin, development and actual organization of foreign consulates; the stipulations contained in the principal diplomatic conventions, relating to the establishment of foreign consulates, from the sixteenth century to the present time; the laws of regulation of different states concerning consuls; and the theory of the consulate. This volume is terminated by an alphabetical table of the authors cited, with the entire titles of their works.

"It being the duty of consuls to protect and defend the interests of the merchants and navigators of their nation, they are frequently under the necessity of undertaking to decide questions of law. It will be agreed, that, if to fulfil worthily and successfully this important part of their functions, it is of the first necessity that they should be acquainted with the different judicial and administrative institutions, created for the benefit of commerce and navigation, it is not less indispensable that they should have clear and just notions of the commercial and maritime laws of the countries where they reside. I do not believe, therefore, that I have gone aside from my subject, by devoting a chapter specially to the principal monuments of maritime and commer-

<sup>1</sup> Compare the table of matters in the essay on Consuls with that in the Manual of Consuls.

cial law anterior to the eighteenth century; and, by giving, under the rubrick of each state, a sketch of the successive development of its commercial and maritime jurisprudence, from that epoch to the present day, accompanied by an indication of the most useful works to be consulted, under this double point of view: on the contrary, this labor has seemed to me to be indispensable in a book destined to serve as a guide to those who follow the consular career.

"I have confined myself to treating of those states which have a maritime commerce, the only ones among whom the office of consul has acquired any importance. The United States of North America, having formally acceded to the principles of the law of nations by which Europe is governed, this power, essentially commercial, must naturally be included in the researches which make the object of my labors.

"In regard to the order, in which it might be proper to treat of the different powers, with which I have occupied myself, I have adopted that which Mr. F. G. de Martens has followed in his diplomatic course, or table of the exterior relations of the powers of Europe, as well among themselves, as with other states in the different parts of the globe.<sup>1</sup> According to this order, which divides Europe into the powers of the South, West, North, and East, France, placed at the head of the other powers, is followed by the states of Italy, Spain, Portugal, Great Britain, the Low Countries, Denmark, Sweden, (and Norway), Russia, Prussia, Austria, (Germanic Empire), Turkey, and the United States of North America.

"It will be perceived, that the task which I have undertaken has required laborious researches. I have carefully collected, I am sure, and I hope also with some discernment, whatever I have found relative to my object in the works which it has been possible for me to consult. The Collection of Maritime Laws anterior to the eighteenth century, published by Mr. Pardessus,<sup>2</sup> the Course of Commercial Law of the same author,<sup>3</sup> the History

<sup>1</sup> Berlin, 1801, T. I—III, in 8vo.

<sup>2</sup> Paris, 1828—1835, T. I.—III. in 4to.

<sup>3</sup> Paris, 1831, T. I.—V. in 8vo. fourth edition.

of Commerce between the Levant and Europe, by Mr. Depping,<sup>1</sup> and the Diplomatic Course, (above cited) of the learned publicist, F. G. de Martens, have furnished me with precious materials for the composition of the chapters on the maritime laws, on the judicial and administrative institutions which govern the commerce of France, on the origin of foreign consulates, and on the subsequent development of that institution. I have drawn from the excellent work of the late Mr. Schoell, intituled *Course of History of the European States*, from the overthrow of the Roman Empire in the West, to the year 1789,<sup>2</sup> the greater number of the historical notices contained in the notes. I have conscientiously indicated the sources from which I have drawn, and, so far from being desirous of passing off the productions of others for my own, I give my work for what it is in fact, and what it must necessarily be from the very nature of its object, a compilation. It is as much for the sake of the authors from whom I have borrowed, as for that of my readers, that I have preferred to borrow literally, rather than to cover the extracts which I have made under the mask of a new redaction.

“The explanations contained in the notes will suffice to put those readers in the right track, who, in reference to some accessory point, more or less in relation with the principal matter, should desire to make more profound researches. I have given to these notes more or less extent, according as I have considered the sources to be consulted to be more or less within the reach of the reader.

“The terms of practice, of finance, of commerce, &c. are explained at the bottom of the text.

“I have dwelt at more length on the judicial and administrative institutions which protect French commerce, than on those of other states, because these institutions have been carried in France to a degree of perfection which is nowhere else to be met with.

“The book, for which I solicit the indulgence of the public, is not, without doubt, exempt from imperfections ; but, such as it is,

<sup>1</sup> Paris, 1830, T. I. II. in 8vo.

<sup>2</sup> Paris and Berlin, 1830—1834, T. I.—XLVI. pet. in 8vo.

I dare to hope that it may be of real utility to the consular agent and the diplomatist, to the man of the law, to the magistrate, and to the merchant."

The first volume, and the first part of the second volume only, have yet been published. The remaining part will contain the laws of the different states concerning consuls, and the theory of the consulate. That portion of the first volume, which treats of the maritime laws of Europe and the Levant, anterior to the seventeenth century, contains the fullest and most accurate account of the various compilations of those laws, which we have ever seen. This whole volume, indeed, is particularly interesting and valuable to the commercial lawyer. At present, it is quite impossible for us to follow the author through his analysis of the maritime laws and institutions of the commercial world. We may possibly return to the subject in some future number. In the mean time, we conclude this notice of Mr. Miltitz's work, in the language of an English journal, the *Foreign Quarterly Review* for April, 1837 :

"This laborious and difficult task has been executed with the greatest skill and success; and whoever has occasion to consult his book will find in it an inexhaustible source of information on these subjects, equally useful to the merchant, the jurist, and the consular agent."

2.—*The Jubilee of the Constitution. A Discourse delivered at the request of the New York Historical Society, in the city of New York, on Tuesday the 30th of April, 1839; being the fiftieth anniversary of the inauguration of George Washington, as president of the United States, on Thursday, the 30th of April, 1839.* By JOHN QUINCY ADAMS. New York: Published by Samuel Colman, 1839.

All men are no doubt consistent with themselves; but there are some, to whose conduct we are never able to get the key; and the venerable ex-president Adams, we confess, is to us among that number. After being at swords' points with his old federal friends for so many years, Mr. Adams comes out in this discourse and fairly out-federals old federalism, in his notions of the consti-



tution of the United States. We are sorry that he has given the authority of his name to what seem to us to be such palpable heresies, as we find in this pamphlet ;—doctrines, which might slip from the tongue inadvertently in the hurry and warmth of controversy, but which we should think would hardly live through the deliberation necessary to record them on paper. Argument would hardly be in place in a discourse of the nature of that before us ; and this is probably the reason why the orator deals almost entirely in assertion ; but, though we could hardly expect reasoning and argument, the writer's assertions would have lost little of their force or pertinency, if he had withheld the lurking sneer, which accompanies them throughout, at those who entertain and defend the opposite doctrines.

3.—*Crown Cases reserved for consideration ; and decided by the twelve judges of England, from the year 1799, to the year 1824.* By WILLIAM OLDNALL RUSSELL and EDWARD RYAN, of Lincoln's Inn, Esquires, Barristers at Law. With references to the English Common Law reports. Philadelphia : T. and J. W. Johnson, law booksellers, successors to Nicklin and Johnson.

4.—*Crown Cases reserved for consideration ; and decided by the judges of England, from the year 1824, to the year 1837.* By WILLIAM MOODY, of Lincoln's Inn, Esq., Barrister at Law. With references to the English Common Law reports. Vol. 1. Philadelphia, by the same.

Criminal jurisprudence in England has not received so much attention, compared with civil, as its importance demands. The two moderately sized octavo volumes before us contain, we believe, all the cases in which questions of law have been reserved and the opinions of the judges taken thereon, since the commencement of the present century. The cases, too, are very briefly stated ; and, it is quite manifest, that they have not been deemed, either by counsel or court, to be worthy of the consideration usually given to civil cases. We are glad, notwithstanding, that the Messrs. Johnsons have reprinted these reports. They

will be appreciated the more, from the fact, that we have so few English reports of criminal cases. We perceive, that the publishers have lettered these volumes "English Crown Cases," and have numbered them first and second; from which we infer, that they intend to continue the series. They are neatly and so far as we have examined them correctly printed.

5.—*The Public Statute Laws of the state of Connecticut, compiled in obedience to a resolve of the General Assembly, passed May, 1838, to which is prefixed the Declaration of Independence, Constitution of the United States, and Constitution of the state of Connecticut.* Published by authority of the state. Hartford: John L. Boswell, publisher, 1839.

The work, of which the foregoing is the title, is a republication of the edition of 1835, (see Am. Jurist, vol. xviii, p. 231), with the addition of the statutes since enacted, except the statutes of the last May session, incorporated therein, and a new and full index. It was prepared by a committee appointed for the purpose, consisting of Messrs. John Beach, Thomas C. Perkins, and Royal R. Hinman, the secretary of the state.

We wish that gentlemen employed to revise and publish the statute laws of a state would give some account of the origin, progress, and consummation of their work, in the form of an advertisement. In this volume of the Connecticut statutes, there is absolutely nothing, from which to infer by what authority, or by whom, it was executed; nor are we even told to what date it includes the laws. From any thing, that appears, too, the work may be entirely spurious. It is not authenticated, nor does it purport to be, in any manner, or by any person. It is said, in the title, to be published by authority; but, if cited in another state, upon what could the court rest an opinion that it was authentic?

We perceive, that the secretary has taken the precaution to secure a copyright for the work, on behalf of the state. We are not apprized that this has been done "by authority;" but whether

so or not, it is the most mean and pitiful piece of *political* economy, to say no more, that we ever heard of. It would have been more worthy of the state, and better economy in the long run, to have compelled the publishers to sell it to the citizens at the lowest price for which it could be afforded, and thus to diffuse as much as possible a knowledge of the laws among the people. The revised statutes of Massachusetts, a volume containing nearly three times as much matter, is sold at two dollars and forty cents a copy, in pursuance of a compact between the state and the publishers, and we know, that in consequence of the lowness of the price, the sale has been very great and greatly to the profit of the publishers, even at that low price. We repeat it, the attempt by any state, to make money out of its citizens by selling them a knowledge of the laws, or the allowing of others to do so, in the name or on "behalf of the state," is mean and contemptible in the extreme.

It is not very probable, that this pretended copy-right will ever be pirated : but if it should be, we think it more than doubtful whether it could be sustained. We are not aware of any decision of the precise point,<sup>1</sup> in this country. A French writer, however, on the subject of copyright, decides against such a claim, in the following paragraphs :

"In general, acts of public administration cannot be the object of a privileged property, either on behalf of the government or of the functionaries from which they emanate. The decree of July 6, 1810, and the ordinance of January 12, 1820, recognise the right of every one to print and sell the senate-consults, codes, laws, and regulations of public administration ; it is only prohibited to publish *editions* of them before their insertion in the bulletin of laws. Circulars, instructions, and official letters, which are also acts of the public authority, belong to all and may be published by every body.

"It is the same of the reports published by the different ministers, on the administration of justice, finances, &c. The reasons

<sup>1</sup> It has been decided, we believe, that the opinions of a court cannot be made the subject of a copy-right in this country.

of laws, (*exposés des motifs*) and the reports of committees of the chambers, are also public documents, emanating from the authority of government, and consequently belong to all." Gastambide, *Traité des Contrefaçons*, 24, 25.

There is the same reason here as in France, for holding that a state cannot secure to itself the exclusive right to publish and sell its laws. In any of the remarks, which we have been led to make on this subject, we do not intend to reflect upon the committee or the secretary. They have no doubt intended, and, so far as the preparation of the statutes is concerned, have actually performed their duty, in a highly creditable and proper manner. The book is very beautifully and correctly printed.

4.—*The Jurist: or Law and Equity Reporter, containing full reports of all the cases argued and determined in the several courts of law and equity, in England, during the year 1839.* Nos. 1 and 2. New York: Halsted and Voorhies, 1839.

Though the publishers of this work have forgotten to send us a copy of it, our duty as faithful chroniclers of passing events requires that we should inform our readers what it is. *The Jurist*, then, is a monthly American reprint of the cases reported for and published in a weekly London law periodical, called the *Jurist*; and is to be published at the price of seven dollars a year. Its object undoubtedly is to furnish the profession with the English reports as early as possible. It has one advantage over the series of Term Reports, the publication of which was recently commenced by Messrs. Little and Brown, in Boston;—it contains the cases decided in the chancery and some other courts, not embraced within the plan of the Term Reports. But, on the other hand, it labors under the double disadvantage, that the cases are not so fully reported as in the Term Reports, and are not arranged so as to make independent volumes. The members of the profession will, therefore, do well to have both. The London periodical from which the *Jurist* is reprinted is noticed in our last April number, and the Term Reports in our last number, "to which we refer for a more particular description."

7.—*Der gemeine deutsche bürgerliche Prozess in vergleichung mit dem preussischen und französischen Civilverfahren und mit den neuesten Fortschritten der Prozessgesetzgebung* von Dr. C. J. A. MITTERMAIER, Geheimenrath und Professor zu Heidelberg. Erster Beitrag. 3e Auf. Bonn, 1838.

The labors of the learned author of the above entitled work do not seem to be confined or even chiefly directed to the department of the criminal law. We have already noticed his works on criminal procedure and on evidence in criminal cases. We have here before us a similar work, on the common German civil process, compared with the Prussian and French systems, and the most recent legislative provisions on the subject of procedure.

This work is divided into eighteen sections: 1, introduction; 2, connection of procedure with political and organic institutions; 3, requisites of a system of civil procedure; 4, common German procedure; 5, Prussian procedure; 6, French procedure; 7, changes introduced by the legislation of particular states; 8, principles upon which the investigation of the facts is conducted; 9, publicity of the proceedings; 10, professional aid; 11, reciprocal relation of the parties to one another, and means of preventing unjust suits; 12, courts of conciliation; 13, statement of mutual allegations and proofs; 14, verbal and written proceedings; 15, exhibition of the complaint to the court; 16, separation of the matters of fact alleged by the parties from the conclusions of law; 17, means of eliciting the question in controversy; 18, institution of the concluding mutual statements for the security of the parties.

We can scarcely give an idea of the work, by a mere translation of the titles of the sections, imperfect as that must necessarily be; but our readers will perceive that it treats of a variety of subjects, which are of general as well as local interest. Some one or more of the sections, we may hereafter take occasion to transfer to the columns of our journal. In the section on courts of conciliation, the author gives an account of the attempts which have been made in ancient and modern times, to prevent law suits by a timely accommodation; a subject which has heretofore awakened considerable curiosity and attention among our legislators.

- 8.—*Traité théorique et pratique des Contrefaçons en tous Genres, ou de la Propriété en matière de Litterature, Theatrè, &c.* Par ADRIEN GASTAMBIDE, avocat, ancien Magistrat. Paris, 1837.
- 9.—*Traité de la Contrefaçon, et de sa Poursuite en Justice, concernant : les Brevets d'Invention, &c., la Propriété littéraire, &c.* Par ETIENNE BLANC, avocat a la cour royale de Paris. Paris, 1838.
- 10.—*Traité des Droits d'Auteurs dans la Litterature, les Sciences, et les Beaux-Arts.* Par AUGUSTIN-CHARLES RENOARD, conseiller a la cour de cassation. Tome Premier. Paris, 1838.

The almost simultaneous publication of these three treatises in Paris shows that considerable interest exists in France, as well as in other countries, on the subject of the rights of authors and inventors. The first named is a brief, methodical, and very clear exposition of the several matters of which it treats, regarded more in a practical than in a theoretical point of view. The second treatise is of greater extent, and is of a still more practical character than the first. It resembles very much a modern English or American work on some branch of the law ; containing all the decided cases, with the reasons (so far as they are given) on which they are founded, arranged in a systematic order ; and being a sort of digest of the existing jurisprudence, rather than an elementary treatise.

The third treatise above-mentioned, of which the first volume only has been published, is of a different character altogether. The Review of Legislation and Jurisprudence thus speaks of it :

“The work of Mr. Renouard on patents for inventions had already assigned him a distinguished place among modern jurisconsults ; and his new labor must put the seal to a reputation justly acquired. History, philosophy, foreign legal systems, have all been happily turned to account, and concur in forming a complete and harmonious whole. Books like Mr. Renouard's are rare in this age of miserable and half formed productions ; they deserve a particular study.”

It is to this work we are indebted for the dissertation in our

present number on the Theory of the Rights of Authors, which will give our readers a better idea than any description of our own of the character of the work. We are impatient to receive the second volume.

These French works contain a great many decided cases, on points in the law of copy-right and patent-rights, which have not been the subject of legal investigation in this country, some of which we may hereafter take occasion to present to our readers.

11.—*A Manual of Law, for the use of Business Men: containing, alphabetically arranged, the legal principles of most frequent application to ordinary business transactions, together with references to the authorities sustaining them.* By AMOS DEAN. Albany, William A. Gould & Co. New York, Gould, Banks & Co. 1838.

This is a small octavo of two hundred and forty pages, containing, as the title sets forth, the legal principles of most frequent application in ordinary business, arranged in alphabetical order. We have no great faith in the utility of law manuals for business men,—law summaries,—and other works intended to facilitate the desirable end of making “every man his own lawyer;”—not, however, because something cannot be done in this behalf, but, because every thing that has been hitherto done has been inadequate to the end proposed. Works of the description alluded to have usually been of the most abstract, instead of a practical character; made up of the ultimate and elementary principles, the axioms of legal science, rather than of practical instructions for the conducting of affairs in their legal relations. The work before us is not an exception. It may be a useful manual for the practising lawyer, but we doubt very much whether the man of business will find it a manual adapted to the conduct of affairs, without the aid of a professional adviser. Suppose, for example, that an owner of landed estate, who desires to make his own leases, looks into Mr. Dean’s manual, for the necessary instruction. He is there informed, under the head of Lease, that :

"To the making of a good lease several things must concur.

"1. There must be a lessor not restrained from making a lease.

"2. A lessee not disabled to receive.

"3. A thing demised which is demisable, and a sufficiently clear description of it, to enable it to be identified."

Our inquiring landlord finds these three negative qualities of a good lease set down with much gravity and in due order. But he may look in vain, through the same title, and, indeed, through the book, for any further information, as to who may be a lessor, who may be a lessee, and what thing may be demised,—the very things which he expected to find in his manual,—and, for knowledge on these points, he will be reduced to the necessity of going back to his attorney. We hardly think this a fair specimen of the information proffered by the manual, (though we have taken the example at random,) and we do not give it as such. We think a book might be made on legal hygiene, if we may venture upon such an expression, which would be really useful to men of business, and would effect the end proposed by the class of works to which the manual belongs; but it must be made in a wholly different manner, from the books of that class; not stating abstract elementary principles, to be applied by men of business, in the daily relations of life; but singling out some particular line of business, and giving practical instructions for the conducting of it in all its legal relations.

12.—*An analytical Abridgment of Kent's Commentaries on American Law. With a full series of Questions for examination, adapted both to the analysis, and to the original Commentaries.* By J. EASTMAN JOHNSON, Counsellor at Law. New York: Halsted & Voorhies, 1839.

This is an octavo volume of nearly four hundred pages, two hundred and sixty of which are made up of an abridgment of Kent's Commentaries, and the residue are devoted to a series of questions adapted to that work. The abridgment is very much condensed. It is intended, as the author informs us in his preface, for the use of merchants, junior members of the bar, ma-



gistrates, students at law, and students in literature. The work is indorsed by Messrs. D. D. Barnard, of Albany, and B. F. Butler, of New York, whose certificates are published immediately next to the dedication, under the head of "Testimonials." The last named gentleman states that he has read the work. We are not in the habit of placing much reliance on "testimonials;" but when a gentleman of the established reputation and character of Mr. Butler gives his sanction to a work, we think the public have a right to rely upon it with confidence. Mr. Butler's certificate is as follows :

"I have read the analytical abridgment of Kent's Commentaries recently compiled by J. Eastman Johnson, Esquire, and take pleasure in saying that the work appears to me to have been executed with much judgment and accuracy. If properly used by the student,—that is to say—not as a substitute for the original work, but as a means of assisting him in understanding, digesting, and recollecting its contents—it can scarcely fail to be a useful appendix to the commentaries. The questions subjoined to the abridgment seem to me, so far as I have examined them, to be pertinent and well framed. They will be found useful to instructors who employ the original work as a text book; and if the student who has not the benefit of regular examinations will apply himself to the labor of writing out, after the diligent study of the text and the abridgment, answers, from memory, to the questions on each lecture, I cannot doubt the great advantage he will derive from this manual."

13.—*The Trial of Jesus before Caiaphas and Pilate. Being a Refutation of Mr. Salvador's chapter entitled "the trial and condemnation of Jesus."* By M. DUPIN, advocate and doctor of laws. Translated from the French, by a member of the American Bar. Boston, Charles C. Little and James Brown, 1839.

This little work, though chiefly interesting in a religious point of view, and as a contribution to the department of biblical criticism, is not without interest to the student of general or compara-

tive jurisprudence. Dupin, the author, is one of the most celebrated of living French jurists ; and, the translator, we understand, is a gentleman "of the American Bar," not less distinguished for his literary and scientific attainments, than for his knowledge of the law. The preface of the translator will serve, better than any thing of our own, to give an idea of the work ; and, as it is short, we give it entire.

"A few years ago, Mr. Joseph Salvador, a physician—and a descendant of one of those Jewish families, whom the intolerance of Ferdinand the Catholic expelled, in a body, from Spain, about the year 1492—published at Paris a learned work, entitled 'Histoire des Institutions de Moïse et du Peuple Hebreu,' or History of the Institutions of Moses and the Hebrew People ; and in one chapter of his work he gives an account of the *Administration of Justice* among the Hebrews. To that chapter he has subjoined an account of the 'Trial and Condemnation of Jesus ;' in the course of which he expresses his opinion, that the trial, considered merely as a *legal proceeding*, was conformable to the Jewish laws.

"The author of the following little work, M. Dupin, who is one of the most eminent lawyers of the French bar, immediately called in question the correctness of Mr. Salvador's opinion, and entered upon an analysis of this portion of his work, with a view to examine its soundness ; and the present volume contains the result of that examination, conducted with great legal skill and extensive learning.

"It appears, that he had, many years before, in a little work, entitled '*The Free Defence of Accused Persons*,' published in 1815, taken the same views of this great trial ; which, as he observes, has been justly called 'the *Passion* or *Suffering* of our Savior ; for he did in truth *suffer*, and had not a *trial*.'

"The author's attention, however, had been withdrawn from this subject for several years, when it was again brought under his notice by the work of Mr. Salvador ; a copy of which was sent to him by that writer, with a request that M. Dupin would give some account of it. Accordingly, says the latter, 'it is in

compliance with *his request*, and not from a spirit of hostility, that I have made this examination of his work ;' and he gives ample proof of his good feeling towards Mr. Salvador, with whom, he says, he is personally acquainted, and for whose talents he has a great respect.

" With this friendly spirit he enters upon his examination ; which is conducted with an ability, learning, animation, and interest, that leave nothing to be desired. As an argument, his work is unanswerable, he has demolished that of his adversary ; and, for intense interest, we do not know any publication of the present day to be compared with it.

" The introductory *analysis* of Mr. Salvador's chapter on the administration of justice according to the Jewish law will be highly instructive and interesting ; and those persons, who have not been accustomed to read the Bible with particular reference to the *law*, will find many new and striking views of that portion of the Scriptures. They cannot fail to be particularly struck with the extraordinary care taken to secure by law, the personal liberty and rights of the citizen.

" According to Mr. Salvador's view, the fundamental division into *castes* is the principal basis of the oriental theocracies. Moses, on the contrary, took for his basis the *unity* of the people. In his system of legislation the people are every thing ; and the author shows us, that every thing, eventually, is done for them, by them, and with them. The tribe of Levi was established, only to supply a secondary want ; and that tribe was very far from obtaining all the powers which we are apt to attribute to it ; it did not make, nor develope the laws ; it did not judge or govern ; all its members, even the high priest himself, were subject to the control of the elders of the nation, or of a senate legally assembled.

" Intimately connected with these rights of the people was the *liberty of speech* ; and Mr. Salvador, in his chapter on the *public orators and prophets*, maintains, and in the opinion of M. Dupin, proves clearly, that in no nation was the liberty of speech ever so unlimited, as among the Hebrews. Accordingly he observes

—‘What an additional difference was this between the Israelites and the Egyptians! Among the latter, the mass of the people did not dare, without incurring the hazard of the most terrible punishment, to utter a word on affairs of state; it was Harpocrates, the god of silence, with his finger on his closed lips, who was their God; in Israel, it was *the right of speech*.’

“But we forbear any further reflections, and submit this remarkable performance to our readers. Those, who are familiar with the animated tone of French writers, will perhaps discover in this translation some loss of the fire and intensity of the original; but the translator’s purpose will be effected, if his version shall be found to be a faithful one.”

14.—*Dissertatio juridica inauguralis, de Legibus et Institutis in Commodum Mente Alienatorum*, quam publico ac solenni examini submittit JANUS SCHROEDER. Trajecti ad Rhenum, 1838.

This dissertation, in two hundred and forty octavo pages, presents the fullest, most accurate, and most methodically arranged view, which we have ever seen, of the laws and institutions of different countries, for the benefit of the insane. It is divided into three parts: I. De legibus et institutis apud populos cultiores circa mente alienatos ante sæculum XIX obviis; II. De legibus et institutis apud populos cultiores in mente alienatorum causa sæculo XIX ortis; III. De jure, in causa mente alienatorum constituendo observationes. The *first* part contains three chapters: 1, de legibus et institutis, quæ mente alienatorum personas spectant; 2, de jure ad tuenda mente alienatorum bona apud varios populos constituto; 3, de examinanda animi conditione eorum, qui mente alienati esse dicuntur. The *second* part contains three chapters: 1, de legibus et institutis, quæ mente alienatorum personas spectant; 2, de legibus ad tuenda mente alienatorum bona sancitis; 3, de examinanda animi conditione eorum, qui insani esse dicuntur. The *third* part contains two chapters: 1, de iis, quæ vel personarum vel bonorum mente alienatorum cura a legumlatore adhuc postulare videntur; 2, de causæ cognitione et mentis alienationis inquisitione rite instituenda.

## INTELLIGENCE AND MISCELLANY.

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### ENGLISH EQUITY IN AMERICA.

It would be mere affectation in us, to pretend to be indifferent to the estimation, in which the works of our own countrymen are held by men of scientific and literary distinction in other countries. We were much gratified, therefore, to see an elaborate review of Mr. Justice Story's work on Equity Pleading, in the (London) Law Magazine for May last, under the title of English Equity in America. The writer, who, from the signature, and certain internal evidence, we conjecture to be Mr. Calvert, author of a treatise on Parties to Suits in Equity, pronounces a favorable and complimentary judgment upon the work. The following extract, which, however, relates quite as much to the subject of the title of the review as to the book reviewed, will be read with interest.

“ When we found that a lawyer, distinguished by these celebrated publications, had written commentaries upon the pleadings and practice of courts of equity in England and America, our curiosity was excited to see how far our English doctrines are in harmony with those of the writer himself, and of the courts of which he is a distinguished ornament. That there should be a difference upon essential principles, we did not expect. But we have certainly been much surprised to find, that all our doctrines, with, we believe, scarcely any exceptions, are approved of and adopted in daily practice in the American courts of equity. A half century has elapsed since the two countries were separated. During that period the courts of America have been wholly inde-

pendent of the courts of England. American advocates have been allowed to argue, and judges to decide, without any other deference to the decisions and principles of the English courts, than that which good sense and pure morality will always retain over enlightened and correct understandings. Yet we find that the sway of our equitable principles is as firmly established in American courts, as if they still owed allegiance to the house of lords, as to the supreme court of appeal. This result appears to us to be most satisfactory ; a result, in which this country may find abundant cause for self-congratulation. We may add, in justice to great men now departed, that such coincidence of opinion, such approbation of lawyers, of men of property, of men engaged in business, in all the intricate relations which arise out of the possession and transfer of property, and compelled by their own interests and labors to observe the consequences to which legal and equitable principles have led, of men, too, who have the power of changing laws which they deem erroneous, as well as that of confirming them when found to be correct, may teach this country how large a tribute is due to the memory of many of her chancellors, of such lawyers as lords Nottingham and Macclesfield, who sowed the seeds of our equitable jurisprudence, and lords Hardwicke and Eldon, who have successively added their exertions in bringing the harvest to maturity. The dynasty of Napoleon has passed away, but his code, in fulfilment of his prophecy, still asserts for his memory abundant claims upon the gratitude of France : and now that England has lost political dominion over her colony, she still maintains with every judgment that issues from her courts a judicial authority over her independent ally.

“ The cases quoted by Mr. Justice Story in support of his opinions are English cases, in the proportion of full twenty to one. We search in vain for fresh lights thrown by American judges upon our equitable doctrines. Those judges have followed in our traces with scrupulous care ; nor does the work before us mention any departments of the science, in which they have introduced alterations or essential improvements. We confess, that

we did not wish to find the homage to English authority carried to so great an extent. It would have given us far greater pleasure to have been informed of some decisions, in which more original views had been taken, and in which our commentator had relied with greater confidence upon the decisions of American courts."

In the following remarks, the reviewer comments upon Mr. Justice Story's criticism of the rule laid down by the former, (if we are right in our conjecture that the writer is Mr. Calvert) in his work on Parties to suits in Equity. Both the rule and the exposition of it are well worthy the attention of the equity lawyer.

"There is no part of the commentaries which is more carefully labored than the chapter on the proper parties to bills. We advert to it the more attentively because we venture to think that our author has dissented, without good reason, from a criticism upon the general rule concerning parties, which has been offered in a modern publication. 'In a recent work,' (Calvert on Parties to Suits in Equity) it is remarked in a note, 'which came to my hands since this whole chapter on parties was written, it is stated that the true rule is, that all persons having an interest in the *object* of the suit, not all parties having an interest in the *subject* of the suit, ought to be made parties. Whether this criticism on the language of the authorities and of the elementary writers is well or ill founded, it does not seem necessary here to consider, as I am not aware that it removes a single difficulty or doubt in examining the subject of parties.' It is obvious that there is a distinction between the ideas conveyed by the two words. The prayer contains the object; the stating and charging part, the subject of suit. In one bill a trust is stated, and execution of it is prayed; in another the same trust is stated, with a prayer that the trust fund may be reduced into possession. These bills are identical in the subject of suit, namely, the trust. They differ in the object, as one is the execution of the trust and the other is not. The *cestuis que trust* are necessary parties in the former, but not in the latter. Again, two bills con-

tain the same statement of the same mortgage, the one praying a sale, the other a foreclosure. In the former the personal as well as the real representative of the deceased mortgagor is to be a party, in the other the real representative alone.

“But it may fairly be said, that the vagueness introduced into the rule by the use of the word *subject* is much greater than it would appear to be from the consideration of these cases. Two bills may be filed with reference to the same landed estate, the one praying specific performance of a contract for sale, the other praying a partition. There is certainly no abuse of language in applying the word *subject* to the estate. Yet no reasoning is necessary to show that these two suits will altogether differ from one another in respect of the persons to be made defendants. These doubts disappear at once, if the word ‘object’ is substituted in the general rule for the word ‘subject.’ We have mentioned these instances as being of the most common occurrence. They appear to be sufficient to show that the distinction has not been suggested without adequate reason. In truth, the distinction is one of vital importance. A pleader’s mind must for ever dwell on his decree—on the position which he is to occupy at the hearing for further directions, on the relief to be then obtained, and the mode in which the several interests of the several parties are then to be dealt with. What difference is there between a bill for relief and a bill for discovery? Simply the object of the suit. The two bills may contain the same statements of the subject. They differ in the prayer, that is, in the statement of the object. Corresponding with that difference there is also a difference in the requisite parties.

“In examining a few passages of the work before us, it will, we think, appear, that our author has fallen into one or two errors by overlooking this very distinction, and that he actually adopts it when he desires to be precise. For instance, he observes, ‘Indeed it may be laid down as a general rule, that where any persons are made trustees for the payment of debts and legacies, they may sustain a suit either as plaintiffs or as defendants, without bringing before the court the creditors and legatees for whom



they are trustees, which, in many cases, would be impossible. And the rights of the creditors or legatees will be bound by the decision of the court, when fairly obtained against the trustees. In such cases, the trustees, like executors, are supposed to represent the interests of all persons, creditors or legatees.' In support of this passage, our author quotes an American authority and certain passages in lord Redesdale's treatise on pleading. We regret that we have not the power of referring to the report of the American case. The passage in lord Redesdale's work is founded upon cases in which a principle is avowed quite distinct from representation, and from any consideration of the number of the persons interested. Thus in *Franco v. Franco*, one of the cases quoted, lord Rosslyn says, speaking of *Hamme v. Stevens*, 'That was a suit for the execution of a trust. This is no bill for the execution of a trust.' The distinction then which his lordship took was founded upon the object of the suit, which was in the one case an execution of a trust, and rendered it necessary to bring the *cestuis que trust* before the court, in the other it was merely to reinvest a fund which had been improperly disposed of, and could be accomplished in their absence.

"The following sentence contains another instance of an incorrect expression, which may be attributed to the adoption of some other guide than the object of the suit as the test of the necessary parties.—'In the next place, the frame of the particular bill may also furnish a ground to dispense with persons who should otherwise be made parties. Thus, for example, if a bill is framed for a general account of a trust fund in the hands of trustees, all of them should be made parties. But if the bill is so framed as only to seek an account of so much of the trust fund as has come to the hands of a particular trustee, he alone is a necessary party.' There is a doubt, whether after the recent decision of *Munch v. Cockerell*, (8 Sim. 237,) it would be safe to act upon the case of *Selyard v. Harris*, from which the doctrine contained in this passage is taken; but if it is assumed to be law, the case is not one of dispensation of parties—that is, no persons required by the frame of the suit to be parties were omitted. The case

was simply one, in which the prayer was so worded as not to make certain persons necessary parties, in which the object of the suit required for its fulfilment only the representatives of Harris, a deceased trustee ; and as it did not affect his co-trustees, did not render their presence necessary. If this case is compared with a real case of dispensation, the distinction is immediately apparent. 'So a person who is a mere nominal or formal party may sometimes be dispensed with, although if he were joined in the suit there would be no ground for exemption on his part.'

"We will now offer a few of the instances in which Mr. Justice Story, desirous of being perfectly correct, adopts the word *object*, or a word equivalent in meaning to the word *object*, as a test to necessary parties. Where a person required to be an active party was abroad, the expression used is, 'the objection was held fatal to the entire *object* of the suit.' Again, as to making numerous bodies of persons parties, it is said, that they must be made parties, 'if the *object* of the bill was to dissolve the company, or to subvert its articles.' Mr. Chancellor Kent is said to have proceeded 'upon the ground of a community of interests in the common *objects* of a bill.'

"The whole passage, in which is discussed that privity between persons which enables one to sue the other, is founded upon the very distinction which we have been supporting. 'Another objection which may be taken by demurrer to the substance of the bill is, that though the plaintiff has an interest in the subject-matter of the suit, and a title to institute a suit concerning it, yet he has no right to call upon the defendant to answer his demand.' Other expressions are frequently used, conveying the same idea, as 'interest to be affected by the decree,' 'interests bound by the decree,' 'a common interest centering in the point in issue in the cause.' Precisely upon the same principle, discovery which is material is said to be that 'which is material to the relief prayed.' And new matter fit to be introduced by bill of review must be new matter to prove what was before in issue, and not to prove a title not before in issue. We hope that with these quotations and remarks we may be considered to have eg-

tablished the distinction, which we have ventured to discuss. The pleader's attention cannot be too firmly fixed upon the object of the suit. Every statement and charge, every tittle of evidence, should be as carefully adapted to the attainment of that object, as the selection of parties, the frame of the prayer, or the minutes of the decree. Inattention to this point in the pleadings will be even more prejudicial to the cause, than a rambling and discursive argument in open court; for it will prevent the record from containing that kind of statement, upon which the relief, really desired and due perhaps upon the merits, can [alone] be introduced into the decree."

The reviewer thus concludes his notice :

"We here close our remarks upon the work before us. We have not found in it any new doctrines, nor have we observed any passages in which the author has extended his reflections beyond the limit which had been reached by preceding authors. The merits, on which we found our recommendation of the work, are the admirable arrangement of matter, the clear statement of the cases which are quoted, and the lucid and forcible manner in which their bearing upon the several doctrines is illustrated. These are merits of no ordinary advantage to the practical lawyer, and of inestimable benefit to the student. The former might have received more instruction, if he could have met with some new speculative reasoning, upon the decisions which may be made upon new points likely to arise. But the duty of the latter is to confine his labors, for the present, to the law as it is. With that law, he must make himself acquainted, and we doubt whether he will find it in a form more accessible or more easy of acquisition than in the commentaries before us."

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FOURTH REPORT OF THE ENGLISH COMMISSIONERS ON CRIMINAL LAW.

We have not yet seen this report. The following account of it is taken from the *Monthly Law Magazine*, for June last.

"The original commission, issued by his late majesty in reference to the criminal law, authorized the commissioners to 'di-

gest into one statute all the statutes and enactments touching crimes, and the trial and punishment thereof, and also to digest into one other statute all the provisions of the common or unwritten law, touching the same,' and directed them further to 'inquire and report how far it might be expedient to combine both those statutes into one body of the criminal law; and generally to inquire and report how far it might be expedient to consolidate the other branches of the existing statute law, or any of them.' The commissioners, having by their *first* report submitted that it would be expedient to combine the two statutes into one body of the criminal law, were subsequently directed to 'proceed to frame a detailed report, containing the plan they proposed to adopt in the consolidation of the statutes; and also to proceed in forming a digest of the criminal law, as well written as unwritten, into one statute, with such partial alterations as might be considered by them to be necessary or expedient for more simply and completely defining crimes and punishments, and for the more effectual administration of criminal justice.' A report was accordingly presented, whereby the commissioners detailed the plan they proposed to adopt, for the consolidation of the general statute law: and having been subsequently desired to communicate, at an early period, the result of their inquiries respecting the defence of prisoners by counsel, and capital punishments, they presented a special report on those subjects. In consequence of suggestions contained in the last mentioned report, the commissioners were directed to consider what ought to be the principal heads of a bill on the subject of capital punishments; and also whether it would be advisable to make any distinction in the mode of trial, between adult and juvenile offenders, and, if not, whether any class of offenders could be made the subject of a more summary proceeding than trial by jury; and to furnish an early and separate report thereon.' The commissioners accordingly presented a report on the subject of juvenile offenders, and prepared the heads of a bill for the mitigation of capital punishment, which formed the foundation of the several enactments relating to criminal law passed in the commencement

of her present Majesty's reign. The original commission having terminated with the reign of William the fourth, a new commission conceived on terms similar to the former was issued by her present Majesty, under which the commissioners have proceeded in the composition of a digest of the written and unwritten law relating to crimes.

"Having thus laid before the reader, an outline of the objects and history of the criminal law commission, we proceed at once to the present report.

"The commissioners have here selected from the portion of the digest now in preparation, the crimes of '*homicide, malicious offences against the person, theft, robbery, extortion, false pretences, cheats, embezzlement, and malicious offences against property*,'—embracing, they say, by far the most difficult and important subjects,—and being separated, they add, with the least inconvenience from the rest of the undertaking. At the same time, they are persuaded that it will be *impossible*, from this partial execution of their labors, "to form any conclusive judgment respecting the practical utility of the digest." 'The several parts of the system,' they assure us, 'are so dependent upon each other, and the boundaries of different crimes approach so nearly, that however carefully the outline may be drawn, neither the completeness of particular sections, nor their entire coherence or relative bearings, can be satisfactorily asserted, until the details are filled up, and the whole scheme is accomplished.'

"The present report is distributed into :—

"General remarks on the subject of penal legislation, and the difficulties by which it is attended :

"Observations on the subject, as connected with the present state of the law of England :

"An explanation of the manner in which the difficulties occurring in the execution of the present commission have been met :

"Portions of the digest, with prefatory remarks and notes designed for the purpose of further explanation."

## ANECDOTE OF CHIEF-JUSTICE HOLT.

[From the Legal Observer, for Feb. 18, 1837.]

It is well known that our great luminary of common law, chief-justice Holt, was in his youth much addicted, Shakspeare like, to low company, and fond of all those vagrant scenes and poetical adventures, which it was the delight of that great master of the human mind, the bard of Avon, to encounter. It was one of these adventurous frolics, with a few more of the same stamp, that furnished the subject of a tale respecting his charm for the ague, which was inserted in the Legal Observer some time ago. It will be remembered, however, by those who have read the life of Holt, that shortly after this event—having, as it is somewhat quaintly expressed, “sown his wild oats”—reflection came, and with it conviction, followed by an immediate resolution to forsake the sorry companions of his scape-grace adventures with all their follies, to lead a new life, and betake himself with determined application to his studies. The result of all this, our country has witnessed. Would that his sage example had been followed by the like repentance and reformation on the part of his quondam associates! But alas! the following anecdote fully justifies our conviction to the contrary. Holt, some time after his elevation to the bench, was one day at an assize town, sitting in his judicial capacity, trying criminal causes and misdemeanors. Among the number of prisoners called to take their trial, there was one who particularly struck the judge’s attention, whether from his outward man or his name—or both—and no wonder, for, who should the culprit be but one of Holt’s quondam associates! “Ah, Gilbert! Gilbert!” exclaimed the kind-hearted judge.—“Sorry I am, and much it grieveth me, to behold you, after so many years, in this situation. Pray tell me, man, what has become of all our old companions in sin and iniquity—those graceless associates of our former days of riot, and chambering, and wantonness?” “Lord bless your honor’s reverence,” answered the culprit, with a somewhat whimsical, though crest-fallen manner.—“Long life to your lordship’s worship! they are all of them hanged or transported, except your *lordship* and *myself*!”

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A Treatise on the Law of Injunctions. By the Hon. *Robert Henley Eden*, of Lincoln's Inn, Barrister at Law. Second American from the last London edition : to which is [?] added copious notes, and references to all the decisions of the courts of the United States, and of the different states on this subject : By *Jacob D. Wheeler*, Esq., Counsellor at Law. New York : Published by Gould, Banks & Co., and by Wm. & A. Gould & Co., Albany, 1839.

An Analytical Abridgment of Kent's Commentaries on American Law, with a full series of questions for examination, adapted both to the analysis, and to the original commentaries. By *J. Eastman Johnson*, Counsellor at Law. New York : Halsted & Voorhies. 1839.

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Commentaries on the Law of Agency, as a branch of commercial and maritime jurisprudence, with occasional illustrations from the civil and foreign law. By *Joseph Story*, L.L.D. Dane, Professor of Law in Harvard University. Boston : Charles C. Little and James Brown, 1839.

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Reports of Cases adjudged in the Supreme Court of Pennsylvania, in the Eastern District. By *Thomas J. Wharton*. Vol. IV.

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[The right of retention is equivalent to the lien of the English common law.]

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See page 388.

**Möhl, Dr. Arn.**, Ueber das Geschwornengericht. [*On the jury court.*] Heidelberg, Groos.

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*of nations, or principles of natural law applied to the conduct and affairs of nations and of sovereigns*], par M. de Vattel, avec des additions. 2 vols. Paris, Rey et Gravier.

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## ENGLAND.

**A Treatise on the Construction of Limitations in which the words "Issue" and "Child" occur, &c.** By *John V. Prior*, Barrister at Law.

**A Report of an appeal to the lord bishop of Winchester, visitor of the two Saint Mary Winton Colleges, promoted by William Augustus Hare, fellow, &c, against the election to the vacant scholarships at Winchester and New College in 1829, argued in October and November, 1831.** By *Joseph Phillimore*, D. C. L.

**A Report of Cases determined on the crown side on the northern circuit, commencing with the spring circuit of 1834, and ending with the summer circuit of 1838; with a few cases of earlier date, also a table of cases and an index.** By *Sir Gregory A. Lewin*. Barrister at Law. Vol. II.

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**On the present unsettled condition of the law and its administration.** By *John Miller*.

## IN PRESS OR PREPARING FOR PUBLICATION.

*By Messrs. Charles C. Little and James Brown, Boston.*

**A Treatise on the Law of Insurance.** By *Willard Phillips*. 2 vols. 8vo. Second edition.

**A Treatise on the Rights and Duties of Merchant Seamen, according to the British, the American, and the Foreign Law: with a supplementary chapter on the Interest and Distribution of Prize,**

on board private and public ships of law. By *George T. Curtis*, of the Boston Bar.

The American Conveyancer : by a member of the Boston Bar.

[See the last number of the *American Jurist*, p. 501.]

Digest of the Massachusetts and Pickering's Reports, including vol. 16, of the latter. By *J. C. Perkins* and *A. H. Ward* ; counsellors at law.

New editions of Henry Blackstone's, Shower's, Lord Raymond's, Burrow's, and Strange's Reports.

Manual of Political Ethics. Part II. By *Francis Lieber*.

*By Messrs. T. & J. W. Johnson, Philadelphia.*

A Law Dictionary, adapted to the Constitution and Laws of the United States of America, and of the several States of the American Union, with references to the Civil and other Systems of Foreign Law. By *John Bouvier*.

[See the last number of the *American Jurist*, p. 502.]

*By Hilliard, Gray & Co. Boston.—In Press.*

A Digest of the Decisions of the American Courts of Law and Admiralty. By *Theron Metcalf* and *J. C. Perkins*.

[See our last number, p. 502.]

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#### TEXAS.

The Laws of this new republic have been published, under the following titles :

Laws of the Republic of Texas, in two volumes. Printed by order of the Secretary of State. Houston : Printed at the office of the Telegraph, 1838.

Laws of the Republic of Texas, passed at the first session of the third congress. In one volume. Houston : Telegraph Power Press, 1839.

[The first of these volumes contains also the declaration of Texan Independence, and the constitution of the republic. We hope to be able to notice the laws of Texas in our next number.]

# AMERICAN JURIST.

NO. XLIV.

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JANUARY, 1840.

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## ART. I.—LAW OF CONTRACTS.

### No. 6.—*Of Unlawful Contracts.*

THE last particular, in Mr. Chitty junr's extended description of a simple contract, is the thing agreed to be done or omitted. A contract, he says, is a mutual assent, &c. "to perform some legal act, or omit to do any thing, the performance whereof is not enjoined by law."

Every contract to do an act which the law forbids, or to omit an act which the law enjoins, is void. It has been already suggested that no contract can be enforced, nor damages recovered for the breach of any contract, which contravenes the principles of the common law, the provisions of a statute, or the general policy of the law. No form of words, however artfully devised, can prevent an investigation of the real object of a contract, if that object be illegal. Nor is there any substantial difference, on this point, between simple contracts, and contracts by specialty. Illegality vitiates contracts of every description.

A distinction was formerly taken between *malum in se* and *malum prohibitum*; and some contracts, which violated

merely statutory provisions or general policy, were subjected to less rigid rules, than contracts which violated natural justice or furthered palpable iniquity. This distinction is no longer recognized. Every act is now regarded as unlawful, which the law forbids to be done; and every contract is declared void, which contravenes any legal principle or enactment.<sup>1</sup>

Unlawful contracts are usually divided into divers species; such as immoral, fraudulent, contrary to the principles of the common law, contrary to the policy of the law, contrary to the provisions of a statute, &c. But it seems unnecessary to make more than two distinctive species, viz.: contracts which violate the common law, and contracts which violate a statute.

#### I. CONTRACTS WHICH CONTRAVENE THE PRINCIPLES OF THE COMMON LAW.

These might be subdivided almost indefinitely; for the rules of the common law are almost indefinitely numerous. Convenience requires some classification; but we shall adopt one that is not very minute, nor very logical.

##### 1. *Contracts void for immorality.*

All contracts which have for their object any thing forbidden by the immutable laws of God are void by the rules of the common law, which adopts and lends its sanctions to those paramount laws: such as a contract to commit murder, larceny, perjury, &c., or to pay money, or do any other act, in consideration of the commission of either of those or of any similar offences.<sup>2</sup> So of all contracts that have for their object any thing *contra bonos mores*.<sup>3</sup> Thus,

<sup>1</sup> Co. Lit. 206, b; 2 Stark. Ev. 87, note (k.); 2 Bos. & Pul. 374; 3 Barn. & Ald. 183; 7 Greenleaf, 462.

<sup>2</sup> 1 Pow. Con. 165; 1 Comyn on Con. 31; 1 Pothier on Oblig. 23; 2 Ib. 2; Co. Lit. 206. b; 15 Mass. 430.

<sup>3</sup> Cowp. 39. 343.

an agreement in consideration of future illicit cohabitation is void.<sup>1</sup> But a sealed contract made in consideration of past seduction and cohabitation, or past cohabitation without seduction, is not unlawful, but will be enforced. The law, in such case, regards the contract as obligatory in honor and conscience—as intended for the redress of an injury inflicted by the party—as *præmium pudoris vel pudicitie*. Such is now the established law, though some of the earliest cases do not fully warrant the doctrine.<sup>2</sup> But parol promises, on such consideration, stand on different ground. No consideration is necessary to support sealed contracts, though an illegal consideration makes them void. The better opinion seems to be, that past cohabitation is not a consideration which will support a parol promise, unless there be seduction previously, or children subsequently.

In *Binnington v. Wallis*,<sup>3</sup> a declaration was held bad on demurrer, which alleged that the plaintiff had cohabited with the defendant, and that it was agreed between them that they would no longer cohabit, and that the defendant should allow the plaintiff an annuity, which she gave up upon his promising to pay her as much as the annuity was worth. The court said, “it is not averred that the defendant was the seducer; and there is no authority to show that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature.” And in *Matthews v. —*,<sup>4</sup> the vice chancellor refused to enforce performance of a verbal promise to settle an annuity

<sup>1</sup> 3 Bur. 1568, *Walker v. Perkins*; S. C. 1 Bl. Rep. 517; S. P. 3 Ves. jr. 368, *Franco v. Bolton*; 5 Ves. jr. 286, *Gray v. Mathias*.

<sup>2</sup> See *Whaley v. Norton*, 1 Vern. 483; *Matthew v. Hanbury*, 2 Vern. 187; *Spicer v. Hayward*, Prec. Ch. 114; *Annandale v. Harris*, 2 P. W. 432; *Cray v. Rooke*, Cas. Temp. Talb. 153; *Turner v. Vaughan*, 2 Wils. 339; *Hill v. Spencer*, Amb. 641; *Bainham v. Manning*, 2 Vern. 242; 3 Bro. C. C. 445.

<sup>3</sup> 4 Barn. & Ald. 650.

<sup>4</sup> 1 Maddock's Rep. 558.



on a married woman with whom the defendant (a single man) had cohabited while she was separated from her husband—on the ground that the promise was without a consideration which would support a promise. In *Shenk v. Mingle*,<sup>1</sup> the supreme court of Pennsylvania held that seduction of a female and begetting a bastard child was a sufficient consideration for a parol promise to give her a bond for a sum of money, provided the promise was not obtained by any oppression or unfairness. And in *Gibson v. Dickie*,<sup>2</sup> which was prior to *Binnington v. Wallis*, the court of king's bench decided that a declaration was good, which alleged that the defendant had cohabited with the plaintiff, and had received of her £108 bank stock, and £100 sterling, and that, upon differences arising between them, he had agreed to pay to a third person, for her use, the value of the bank stock and sterling money, *deducting* the value of the £100 three per cent. consolidated bank annuities, and would allow her £30 a year during her life, provided she, after their separation, should continue single and not cohabit with any one. This case is very shortly reported; and it would seem that the court considered a voluntary promise, in consideration of past cohabitation, as founded on a sufficient consideration. If this were the sole ground of the decision, it cannot be reconciled with *Binnington v. Wallis* and *Matthews v. —*. But the deduction from the property which the defendant had received of the plaintiff was part of the consideration; and though the other part (the past cohabitation) might be worthless and void in law, yet as was seen in our last number, the valid part of the consideration would support the whole promise. On this last mentioned ground, though not suggested in the report, that case may well stand, without impugning the other decisions that have been cited.

<sup>1</sup> 13 Serg. & Rawle, 29.

<sup>2</sup> 3 M. & S. 463.

In some of the earlier cases, it was suggested, that a court of chancery would grant relief to the obligor in a bond given to a common prostitute in consideration of past cohabitation. But it seems to be now settled that relief will not be given, in such case, unless there be fraud.<sup>1</sup> In *Clark v. Perriam*,<sup>2</sup> where the plaintiff sought to have a bond enforced as *præmium pudicitie*, and she was proved to have been a prostitute before her connection with the obligor, the lord chancellor dismissed the plaintiff's bill. So where fraud is practised on the woman, chancery will grant relief, as in other contracts. Thus where one pretended to convey an estate to a woman, as *præmium pudicitie*, when in fact there was no such estate, a conveyance was ordered to be made by the man "out of the best of his estate," equal to what was pretended to be conveyed.<sup>3</sup> Lord Hardwick, in the case of *Priest v. Parrot*<sup>4</sup> dismissed a bill for payment of a bond given by a married man to a woman whom he had seduced, she knowing him to be married, and having caused a separation between him and his wife. It is doubtful whether there be not more of indignant virtue than of legal principle, in this decision.<sup>5</sup>

In lady Cox's case,<sup>6</sup> sir J. Jekyll, master of the rolls, decided that a bond given to a second wife, who lived with the obligor, after she knew he had a former wife alive, should be postponed to all simple contract debts of the obligor, who died without property sufficient to pay all his debts. But if she had left the obligor, on discovering that there was a lawful wife alive, and had thereupon taken a bond, it would have "been a just bond, and for a meritorious consideration."<sup>7</sup>

<sup>1</sup> See 2 Vern. 242; 5 Ves. jr. 286; Amb. 641—before cited.

<sup>2</sup> 3 Atk. 333.

<sup>3</sup> Cary v. Stafford, Amb. 520. See Ord v. Blackett, 2 P. W. 435.

<sup>4</sup> 2 Ves. sen. 160.

<sup>5</sup> See the vice chancellor's remarks, in the case of *Matthews v. —*,

1 Maddock's Rep. 558.

<sup>6</sup> 3 P. W. 339.

<sup>7</sup> See Cowp. 742, Ex parte Cottrell.

A contract for the occupation of lodgings, with knowledge that they are to be used for the purpose of prostitution, is void.<sup>1</sup> So of a contract for board and lodging, if, in addition to the pay therefor, a portion of the profits of prostitution is to be received by the landlord.<sup>2</sup> So of a contract for clothes to be paid for from the profits of prostitution.<sup>3</sup> But board and clothing furnished to a prostitute, with knowledge that she is such, is a good consideration for a promise, express or implied, unless they are furnished for the purpose of enabling her to pursue a course of prostitution.<sup>4</sup>

A contract for the sale of prints of an obscene and immoral nature is void.<sup>5</sup> And Best, J., ruled that a printer could not recover pay for printing a work of a grossly immoral nature.<sup>6</sup>

Though, by the common law, wagers on indifferent subjects are legal, yet if they are *contra bonos mores*, and lead to indecent examinations and disclosures, they are void for illegality: as a wager upon the sex of a third person; or a wager that an unmarried woman will be delivered of a child before a certain day.<sup>7</sup>

2. *Contracts to do or omit, or in consideration of doing or omitting acts, the doing or omitting of which is punishable by criminal process.*

Several of the cases under the preceding head fall also within this principle. Thus, letting a house to a woman of ill fame for the purpose of aiding her in her vicious course of life, is an indictable offence.<sup>8</sup> So is the publishing of an obscene print or book.<sup>9</sup> But all immoral acts, which, if the con-

<sup>1</sup> 1 Esp. Rep. 13.

<sup>2</sup> 1 Selw. Nisi Prius, first ed. 60.

<sup>3</sup> 1 Campb. 348.

<sup>4</sup> 1 Bos. & Pul. 340; 1 Campb. 348.

<sup>5</sup> 4 Esp. Rep. 97.

<sup>6</sup> Chit. on Con. 217.

<sup>7</sup> Cowp. 729. 735. 736; 4 Campb. 152.

<sup>8</sup> 3 Pick. 26.

<sup>9</sup> Davis's Justice, 467. 474; 17 Mass. Rep. 337; 2 Stra. 788, Rex. v. Curl.

sideration of a contract, would avoid it, are not indictable. All acts, however, which are indictable, or otherwise punishable criminally, will render a contract void, if they form any part of the consideration. Thus, lord Ellenborough held that it would be a good defence to an action for not supplying manuscript to complete a work according to agreement, that the matter of the intended publication was of an unlawful and indictable nature.<sup>1</sup> So a bond, note, or other promise, given in consideration of stifling or compounding a prosecution for treason, felony, or a *public* misdemeanor, is void;<sup>2</sup> or in consideration of concealing treason or felony—which is a punishable misprision;<sup>3</sup> or of compounding informations on penal statutes, in criminal cases.<sup>4</sup>

In England, where the party injured has much more control, than in this country, of a prosecution for *misdemeanors* that chiefly affect an individual, the defendant, *after conviction*, is permitted “to speak to the prosecutor,” before sentence is pronounced; and if the prosecutor declares himself satisfied, a trivial punishment is inflicted. In such cases, an agreement to make amends to the party injured—to pay his expenses, &c., is lawful—though the intention and end of the agreement are to mitigate the prisoner’s punishment.<sup>5</sup> And the costs of an indictment for an assault, &c., of which a prisoner has been convicted, where judgment has been respited, is a lawful subject of submission to arbitration, and an award thereon is binding upon the

<sup>1</sup> 2 Stark. Rep. 98, *Gale v. Leckie*.

<sup>2</sup> 2 Wils. 347; 5 East, 294; 1 Campb. 45. 55; 16 Mass. 91; 5 Verm. 42; 9 Verm. 23; 2 Car. Law Repos. 415; 1 Bay, 249; 1 Bailey, 588; 2 Southard, 470; 5 N. Hamp. 553; 13 Wend. 592; 4 Hammond, 400.

<sup>3</sup> 4 Bl. Com. 120, 121; 1 Chit. Crim. Law, 3, 4.

<sup>4</sup> 4 Bl. Com. 136.

<sup>5</sup> 4 Bl. Com. 364; 1 Russell on Crimes, 2d. ed. 136; 11 East, 46, *Beeley v. Wingfield*.

parties, that is, the prosecutor and the defendant.<sup>1</sup> But a criminal prosecution is not a lawful subject of reference.<sup>2</sup>

A note given to procure a discharge from arrest on an attachment out of chancery, and in satisfaction of a balance of money in the prisoner's hands, for non-payment of which the attachment is sued—is valid; the process, though criminal in form, being really civil for all purposes for which it is sued out by the party, and therefore subject to his control.<sup>3</sup> So of notes given to an officer, who has a warrant of distress, or a *capias*, against a defendant convicted of a breach of the excise laws, for the purpose of saving his property from sale, or his body from imprisonment.<sup>4</sup> But if an officer take a note, or other promise, of a prisoner sentenced to confinement as a *punishment*, in consideration of his being at large, and as a security for his return into custody, it is void; the indulgence being a breach of duty, for which the officer is indictable. *A fortiori* of an agreement to pay an officer, or other person, for an entire escape, either from a mere arrest, or from confinement in prison.<sup>5</sup>

There are two cases, in which it was held that an agreement in consideration of compounding a misdemeanor, which principally affects an individual (as fraud &c.), is lawful, and may be enforced by action.<sup>6</sup> The authorities, that have been cited, seem to settle this point the other way; and Mr. Chitty, jr., denies that the case in *Espi-*

<sup>1</sup> 7 Taunt. 422, *Baker v. Townsend*; 8 C. 1 Moore, 120. See also *The King v. Dunne*, 2 M. & S. 201. As to a prosecutor's rights and liabilities, in England, see 1 Chit. Crim. Law, 3—10.

<sup>2</sup> 8 D. & E. 520, *Watson v. McCullum*; Kyd on Awards, 63. 69.

<sup>3</sup> 16 East, 293, *Brett v. Close*.

<sup>4</sup> 2 Bos. & Pul. 151, *Pilkington v. Green*; 4 Campb. 46, *Sugars v. Binkworth*.

<sup>5</sup> 2 Hawk. (Curwood's ed.) 196; 4 Bl. Com. 130; 5 Mass. Rep. 541, *Churchill v. Perkins*.

<sup>6</sup> 3 P. W. 279, *Johnson v. Ogilby*; 2 Esp. Rep. 643, *Drage v. Ibberson*.

nasse is law.<sup>1</sup> In *Fallows v. Taylor*,<sup>2</sup> a bond was held to be valid, though the consideration, on which it was given, was, in part at least, an agreement by the obligee not to prefer bills of indictment (which were prepared) against the obligor for levying nuisances in a navigable river. The *condition* of the bond was that the obligor should remove the nuisances by a certain day, and should at no time erect them again. The *recital*, prefixed to the condition, stated that the obligee had been directed by the quarter sessions to prosecute those who had levied the nuisances,—that he had prepared indictments, and that the defendant had applied to him not to prefer them, on condition that he would remove the nuisances and give the bond. The defendant pleaded the general issue, and also performance of the condition; and the issue, joined on the last plea, was found for the plaintiff. A motion was made in arrest of judgment, on the ground that the contract, disclosed in the condition of the bond, was illegal. But the motion was overruled, and the plaintiff had judgment. In this stage of the case, it is clear that the plaintiff was entitled to judgment, unless it appeared, *on the face of the record*, that the bond was unlawful. It did not, however, appear with certainty from the recital in the condition of the bond, that it was given in consideration (wholly or in part) of staying a prosecution for a misdemeanor. Lord Kenyon said “if there were any thing illegal in the consideration, the defendant should have pleaded it.” Had he pleaded and proved it, it seems that he must have prevailed in his defence. For, admitting that there was another consideration (though no consideration was necessary) yet it has heretofore been seen that if one of two considerations is illegal, the whole contract is void. It is necessary to plead the illegality of a bond;<sup>3</sup> but

<sup>1</sup> Chit. on Con. 221, note (o.)

<sup>2</sup> 7 D. & E. 475.

<sup>3</sup> 6 M. & S. 146, *Harmer v. Rowe*.

if it might be given in evidence, the defendant, in this case, gave no such evidence, and the verdict virtually negatived the illegality.

By the revised statutes of New York, misdemeanors, except in certain cases, may be compromised, either before or after an indictment. But an assault and battery cannot be compromised after conviction.<sup>1</sup>

It would seem, from the case of *Norman v. Cole*,<sup>2</sup> that an agreement to pay money, in consideration of exertions to be used to procure the pardon of a convict, is void. This is contrary to the adjudication in *Lampleigh v. Brathwait*.<sup>3</sup> And unless improper means are to be employed to procure a pardon, such an agreement seems to be unexceptionable. The suit, in *Norman v. Cole*, was for the recovery of money deposited with the defendant, to be applied for the purpose of obtaining a pardon; and the ground of decision must have been that the contract was unlawful, and the parties *in pari delicto*. But even if it were unlawful, yet if it were still executory, the plaintiff would be entitled—as the law is held in England—to reclaim it by suit, after having repented of his original purpose.<sup>4</sup> On no ground, therefore, does this *nisi prius* decision seem entitled to be regarded as an authority.

All contracts to indemnify persons, and save them harmless, for doing indictable acts, are void for illegality; as indemnities to printers for publishing libels; or to any person for committing an assault, &c., upon another.<sup>5</sup> In *Battersey's case*, in *Winch & Hutton*, a promise of indemnity for detaining a prisoner unlawfully was held to be

<sup>1</sup> 5 Wend. 111, *People v. Bishop*. See also the revised statutes of Massachusetts, chap. 135, §§ 25, 26. *Price v. Summers*, 2 Southard, 578.

<sup>2</sup> 3 Esp. Rep. 253.

<sup>3</sup> Hob. 105; 1 Brownl. 7; Mo. 866; 1 Rol. Ab. 11.

<sup>4</sup> 2 Stark. Ev. 119.

<sup>5</sup> *Winch*, 49, *Battersey's case*; S. C. Hut. 56; 2 Lev. 174, *Allen v. Rescous*.

good, on the ground that the plaintiff *did not know* that the detention and imprisonment were unlawful; the prisoner being in the custody of the defendant, who was an officer and held a void process. The prisoner recovered judgment against the plaintiff for false imprisonment, and the plaintiff then sued the officer on his promise of indemnity, and maintained his action.<sup>1</sup>

Contracts for the maintenance of suits are void; maintenance being an indictable offence. So, for the same reason, of contracts involving champerty, embracery, and the buying of pretended titles.<sup>2</sup> The sale of lands out of the vendor's possession, and held adversely at the time, is not a valid consideration for a promise.<sup>3</sup> And no action can be sustained by a purchaser against the seller of a pretended title, on account of the seller's subsequent fraudulent connivance with the tenant to defeat the purchaser's title.<sup>4</sup>

Dissuading or endeavoring to dissuade a witness from giving evidence against a person indicted, is an indictable offence, and, of course, any promise, made to a witness, in consideration of his not giving evidence, is void.<sup>5</sup> Extortion is indictable, and any obligation taken by an officer for the payment of what is not due to him, or for more than is legally due, is void.<sup>6</sup>

### 3. *Contracts contrary to sound policy.*

Marriage brocage contracts, that is, agreements to pay third persons for procuring a marriage, by means of their exer-

<sup>1</sup> S. P. 17 Johns. 142, *Coventry v. Barton*; 14 Pick. 174, *Avery v. Halsey*.

<sup>2</sup> 1 Hawk. 454 et seq.; 4 Bl. Com. 134, et seq.; Mo. 751; *Dyer*, 355, b; *Carter*, 229; 1 Leon. 179; 1 Pick. 415; 5 Pick. 348.

<sup>3</sup> 2 Johns. Cas. 58. 423; 2 Caines, 147.

<sup>4</sup> 11 Mass. Rep. 549, *Swett v. Poor*.

<sup>5</sup> 1 Russell on Crimes, 2d ed. 184; 2 Vent. 109, *Mason v. Watkins*; 1 Chipman, 137, *Badger v. Williams*.

<sup>6</sup> 1 Russell on Crimes, 2d ed. 146; 2 Mass. Rep. 524, *Commonwealth v. Cony*. See 2 Pothier on Obligations, 2, 3, the traditionary case of a highwayman, who brought a suit against his companions to recover a share of the plunder.



tions and influence with one of the parties to the match, are void.<sup>1</sup> So of contracts in restraint of marriage. Thus, an agreement between a man and a woman that he would pay her £1000, if he married any other person except herself, was held to be void; the agreement not being to marry her, and she not agreeing to marry him; so that he was restrained from marrying at all, if she should refuse to marry him.<sup>2</sup> The decisions on this subject rest on the ground, that though the law does not oblige any one to marry, yet that marriage is a moral and political duty, and that an agreement "to omit moral duties, which, for the exercise of our virtues, are left to our own free choice," is not the proper subject matter of an action. "Whatsoever a man may lawfully forbear, that he may oblige himself against; except when a third person is wronged, or the public is prejudiced by it."<sup>3</sup> A bond from a widow not to marry again was decreed to be delivered up, although there was a counter-bond to pay a sum of money if she did not.<sup>4</sup> A wager between two persons, that one of them will not marry within six years, is void, unless it be shown that such temporary restraint is proper and prudent in the particular case.<sup>5</sup>

Conditions, which restrain marriage generally, are void, if annexed to devises or legacies. But a condition which restrains marriage as to time, &c., or which requires consent of parents, trustees, &c., is good. Such conditions are regarded as allowable regulations, not prohibitions, of marriage, and as proper exertions of the liberty of disposing of property according to the owner's pleasure—which liberty is as much favored by the law, as the liberty of marriage.

<sup>1</sup> Show. P. C. 76, *Hall v. Potter*; S. C. 3 Lev. 411; *Reeve's Dom. Rel.* 419.

<sup>2</sup> *Wilmot*, 364, *Low v. Peers*; S. C. 4 Bur. 2225; S. P. 10 *Vea. jr.* 429, *Coek v. Richards*.

<sup>3</sup> *Wilmot*, 377.

<sup>4</sup> 2 Vern. 215, *Baker v. White*.

<sup>5</sup> 10 East. 22, *Hartley v. Rice*.

In both cases, such restrictions only are permitted, as are deemed to be of public utility.

But devises and legacies on condition that the devisee or legatee does not marry, or on condition of their being enjoyed so long only as the devisee or legatee remains single, are treated as unconditional devises and bequests. The condition is only *in terrorem*, and is inoperative. The party does not forfeit the bequest by marrying, unless it be limited over by the testator.<sup>1</sup> This distinction, however, does not hold in cases of a condition precedent—as a legacy to be paid to A, on condition of his marrying B, or marrying C, with the consent of the executor, or other person named.<sup>2</sup>

In favor of free and unconstrained marriages, very strict rules are applied to the limitation of legacies, and very liberal rules to the construction of consent to marriages by guardians, trustees, &c.<sup>3</sup>

The rule of the civil law is—*matrimonium debet esse liberum*; and all conditions, whether precedent or subsequent, annexed to gifts, bequests, &c. are void, if their tendency or design be to restrain the liberty of marriage.<sup>4</sup>

Contracts in restraint of trade are against sound policy.

The distinction is well established between agreements that are intended for a general restraint of trade, and those which stipulate only for a particular restraint. All agreements not to exercise a particular trade or profession at any place are void, whether the agreement be by parol or by specialty. And it is immaterial whether it be the trade or pursuit which the party usually follows, or any trade or

<sup>1</sup> 1 Roper on Legacies, 3d ed. chapter xiii; 3 Ridgeway, 205, *Keily v. Monck*; 6 Mass. Rep. 169, *Parsons v. Winslow*.

<sup>2</sup> *Comyns's Rep.* 726, *Harvey v. Aston*; 8 C. Willes, 83; 4 Bar. 2052, *Long v. Dennis*.

<sup>3</sup> See Willes, 99, note (a.)

<sup>4</sup> See *Comyns's Rep.* 734—738.

pursuit, that he engages not to pursue. It is also immaterial whether the agreement is for the life of the party, or for a fixed and definite time. All such agreements are void, although made upon a valuable consideration; and they are denominated agreements for a general, or total, restraint of trade.<sup>1</sup>

But an agreement not to exercise a particular trade or business at a particular place, or not to trade with particular persons, is valid, if made on a valuable consideration. If without such consideration, the agreement is void, though it be by specialty. This is perhaps the only instance in which a contract by specialty does not import a consideration, which the party is by the common law estopped to deny. In this instance, however, though a consideration would probably be presumed, even if it did not appear on the face of the bond or other specialty, yet it may be disproved, and the contract avoided. And if a consideration is stated in the contract, yet it may be denied and disproved.

Agreements not to exercise a trade in a particular place, or to trade with particular persons, are denominated agreements for a particular, or partial, restraint of trade.

In England, an agreement restraining a party from pursuing a trade in any part of England, either for a limited time, or during his life, is intended by the phrase—"an agreement in restraint of trade generally." Whether, in this country, the restraint must be confined to the state where the party resides, or may extend through the United States, might perhaps be questionable.<sup>2</sup>

<sup>1</sup> 1 Pow. Con. 167; 2 Comyn on Con. 467, 1st ed.

<sup>2</sup> See *Mitchel v. Reynolds*, 1 P. W. 181; 10 Mod. 27, 85, 130; 2 Comyn on Con. 1st ed. 467, where lord C. J. Parker examines and discusses all the prior decisions. 2 Saund. 156, note (1); 8 East, 80, *Gale v. Reed*; 8 Mass. Rep. 223, *Pierce v. Fuller*; Willes, 388; 2 Stark. Rep. 80, *Woods v. Dennett*; 1 Pick. 450.

Where a shopkeeper took a servant upon wages, in the business of a linen draper, which the servant was expected to learn and "become a perfect and knowing person in the said trade and mystery," and the servant gave the draper a bond of £100, conditioned to be void if he did not set up or exercise the trade of a linen draper within half a mile of his master's house, the contract was held to be valid. It appeared in the recital of the bond, that this contract was part of the master's inducement to take the servant into his employ, and that the £100 was the sum which the master might reasonably expect to receive from an apprentice to the trade. The consideration, therefore, was an adequate one.<sup>1</sup>

So of a bond, on a similar consideration, wherein the obligor engaged not to exercise his trade within the city and liberties of Westminster.<sup>2</sup> So also of a bond—in consideration that the obligee had taken the obligor as an assistant in the business of a surgeon and apothecary, "for so long a time as it should please the obligee," not to practise on his own account, for fourteen years, within ten miles of the place where the obligee lived. The consideration, in this case, was the being admitted as an assistant with an established practitioner, with a view to the credit to be derived from that situation.<sup>3</sup> So of a contract, in consideration of money and an annuity, by which an attorney engaged to relinquish his business and recommend his clients to another attorney, and not to practise within one hundred and fifty miles of London.<sup>4</sup> So of a contract on sufficient consideration, not to carry on the business of a rope-maker during

<sup>1</sup> 2 Stra. 739, *Chessman v. Nainby*; S. C. 2 Ld. Raym. 1456.

<sup>2</sup> *Cunningham's Rep.* 51, *Clarke v. Comer*; S. C. 7 Mod. 230.; *Rep. Temp. Hardw.* 53.

<sup>3</sup> 5 D. & E. 118, *Davis v. Mason*; S. P. 2 Chitty's *Rep.* 407, *Hayward v. Young*.

<sup>4</sup> 4 East, 190, *Bunn v. Guy*.

life, except on government contracts, and for such of the party's friends as the obligee should refuse to supply on credit; otherwise it seems, of a contract not to carry on the business with any private individuals.<sup>1</sup>

An agreement not to run a stage-coach between Providence and Boston, in opposition to the plaintiff's stage-coach, was held good.<sup>2</sup> Also an agreement not to be interested, directly nor indirectly, in any voyage to the north-west coast of America, or in any traffic with the natives of that coast, for seven years. And it is a breach of such agreement to own and fit out a vessel for such voyage, though the party divest himself of all interest in the vessel and cargo before her departure on the voyage.<sup>3</sup> Also an agreement that one person shall give another all his freighting of goods on Connecticut river at the customary prices, to be paid in goods, and shall not encourage any other boatman to compete with the plaintiff in the business of boating. The consideration is the plaintiff's undertaking to do all the defendant's freighting, and take his pay in goods.<sup>4</sup>

The consideration which will support an agreement for a particular, or partial, restraint of trade, seems to be the same that will support any other agreement, as appears from the cases already cited. In *Bragg v. Tanner*,<sup>5</sup> the sum of ten shillings was held to be a sufficient consideration for an agreement not to keep a draper's shop in Newgate market. And one dollar was held to be a sufficient consideration for a covenant not to run a stage-coach in opposition to the plaintiff.<sup>6</sup> In *Stearns v. Barrett*,<sup>7</sup> the plaintiff's engagement was held to be a sufficient consideration for that of the de-

<sup>1</sup> 8 East, 80, *Gale v. Reed*.

<sup>2</sup> 8 Mass. Rep. 223, *Pierce v. Fuller*; S. P. 2 Chitty's Rep. 407, *Hearn v. Griffin*.

<sup>3</sup> 9 Mass. Rep. 532, *Perkins v. Lyman*.

<sup>4</sup> 3 Pick. 188, *Palmer v. Stebbins*.

<sup>5</sup> Cited in Cro. Jac. 597.

<sup>6</sup> 8 Mass. Rep. 223.

<sup>7</sup> 1 Pick. 443.

fendant; and in *Palmer v. Stebbins*,<sup>1</sup> the consideration was of a similar nature. In all cases, the facts being found, the court is to decide whether there is any consideration which the law recognizes; and in this class of cases, it seems, from the books, that the court is to determine whether the consideration is sufficient to sustain the contract. No case has been found, in which a contract for a particular restraint of trade was avoided for insufficiency of consideration.

Lord chief justice Parker, in *Mitchel v. Reynolds*,<sup>2</sup> notices the cases of grants or charters, customs and by-laws, in restraint of trade. Monopolies are odious, and generally contrary to the policy of the common law. They are said to be contrary to *Magna Charta*. A grant, however, of the sole use of a newly invented art is held to be good, being indulged for the encouragement of ingenuity. But by the English statute of James I. and by the patent laws of the United States, such grants are limited to a few years. Agreements, therefore, concerning the disposition and use of patented machines, &c.—though in restraint of trade—are not, for that reason, void. And a bond, or other specialty, by which a patentee should engage not to use his machine, could hardly be avoided for want of consideration. Indeed, a transfer of his right, *per se*, renders him legally liable to damages, if he should afterwards use the invention. That he may make such transfer without consideration, if he please to give it away, would not seem to admit of doubt.

Patented inventions, and secrets of art or trade, not patented, are not within the scope of the law against restraint of trade. Thus, it has been decided that a trader may sell a secret in his trade, and restrain himself, generally, from the use of it.<sup>3</sup>

<sup>1</sup> 8 Pick. 188.

<sup>2</sup> 1 P. W. 181.

<sup>3</sup> 1 Sim. & Stu. 74, *Bryson v. Whitehead*; *Vickery v. Welch*, in the Supreme Court of Massachusetts, Norfolk County, Oct. 1837.

Forbearing to bid at an auction of property sold on execution is an unlawful consideration for a promise, being against public policy.<sup>1</sup> So of an agreement between two persons not to bid against each other at an auction, and that one shall buy articles and divide them with the other.<sup>2</sup>

It has been decided, in New York, that an agreement for the sale of lottery tickets in a lottery not authorized by the laws of that state, though instituted under the authority of the legislature of another state, is void, as against the policy of a statute of New York.<sup>3</sup> The decisions against allowing seamen to recover on a promise of extra wages for extra services, and witnesses to recover on a promise of extra pay for attendance at court, seem to have been made on the ground of the impolicy of sustaining such promises.<sup>4</sup>

*Post obit* contracts, if unconscionable, are void, as against the general policy of the law. A *post obit* contract is an agreement, on the receipt of money by the promisor, to pay a larger sum, exceeding that which is received and the legal rate of interest, on the death of the person from whom he has some expectation, if the promisor be then alive. Such agreement is not void of course: if made on reasonable terms, in which the stipulated payment is not more than a just indemnity for the hazard, it is valid. But if advantage is taken of the necessity of the promisor to induce him to make such a contract, he is relieved in chancery, as against an unconscionable bargain, on payment of the principal and interest. There are data on which this kind of contract can be ascertained to be reasonable or unreason-

<sup>1</sup> 3 Johns. Cas. 29, *Jones v. Caswell*; 13 Johns. 112, *Thompson v. Davies*.

<sup>2</sup> 6 Johns. 194, *Doolin v. Ward*; 8 Johns. 444, *Wilbur v. How*. See also 8 Johns. 304, *Briggs v. Tillotson*; 5 Halst. 87, *Gulick v. Ward*.

<sup>3</sup> 5 Johns. 327, *Hunt v. Knickerbacker*.

<sup>4</sup> 6 Esp. Rep. 129, *Stilk v. Meyrick*; S. C. 2 Campb. 317; *Peake's Cas.* 72, *Harris v. Watson*; 4 Moore, 300, *Willis v. Peckham*; S. C. 1 Brod. & Bing. 515; 3 Kent's Com. 1st ed. 144.

able; for the lives of the promisor, and of the person on whose death payment is to be made, are subject to valuation on principles and calculations now well established in all life insurance offices.<sup>1</sup>

In *Boynton v. Hubbard*,<sup>2</sup> a covenant made by an heir to convey, on the death of his ancestor, if he should survive him, a certain undivided part of what should come to him by descent or devise, was held to be void at law, as well as in equity. Such a contract was held to be a fraud on the ancestor and productive of public mischief. This was not a *post obit* contract, but fell under the principle of the cases—usually litigated in chancery—of heirs dealing with their expectancies. Chief justice Parsons said—“in unconscionable *post obit* contracts, courts of law may, when they appear, in a suit commenced on them, to have been against conscience, give relief by directing a recovery of so much money only, as shall be equal to the principal received, and the interest.”

There are a few anomalous cases, which may be noticed in this connection, namely, of catching and unconscionable bargains.

Where the plaintiff declared upon an agreement to pay for a horse a barley-corn a nail, doubling at every nail in the shoes of the horse's feet, and averred that there were thirty-two nails in every shoe, and that, doubling at every nail, the defendant had agreed to pay five hundred quarters of barley—Hyde, J., directed the jury to give the value of the horse; which they accordingly did, and it was held good.<sup>3</sup> So where, in consideration of half a crown, the defendant promised to pay two grains of rye on Monday, the 29th of March, four grains the next Monday, and so on in

<sup>1</sup> See 1 Wils. 286. 320; 2 Pow. Con. 187, et seq.; Reeve's Dom. Rel. 419; Newland on Contracts, ch. xxix.

<sup>2</sup> 7 Mass. Rep. 112.

<sup>3</sup> 1 Lev. 111, *James v. Morgan*; S. C. 1 Keb. 560. See also 1 Wils. 295.



progression every Monday for a year—though it was said that all the rye in the world would not be sufficient to fulfil this agreement—yet the court inclined to support the action so far as to let the jury assess reasonable damages: whereupon the suit was compromised by the defendant's paying the half crown and costs.<sup>1</sup> The principle of these cases was recognized by Parsons, C. J., on the trial of the case of *Cutler v. How*;<sup>2</sup> and the jury having, by his instruction, made a deduction that operated justly between the parties, their verdict was sanctioned by the full court.

These and similar cases form an exception to the general rule that a party must recover according to his contract, if he sue upon it, or not recover at all. When an express contract is void, and it is not equitable that the defendant should retain property without paying for it, the usual course is to disregard that contract, and sue upon an implied one.

All wagers are void, that are contrary to public policy: as wagers on the question of war or peace; on the event of an election; on the life of a foreign potentate whose country is at war with that of either of the parties to the wager; on the amount of any branch of the revenue, &c.<sup>3</sup>

4. *Trading with the subjects of an enemy's country, without the license of the constituted authorities, is unlawful.*

"The law," says chancellor Kent, "has put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special

<sup>1</sup> 6 Mod. 305, *Thornborough v. Whitacre*; S. C. 2 Ld. Raym. 1164; 3 Salk. 97. See Bac. Ab. Damages, D. 1; 1 Pow. Con. 162.

<sup>2</sup> 8 Mass. Rep. 257. See also 12 Mass. Rep. 365, *Baxter v. Wales*; Cowp. 793, *Jestons v. Brooke*.

<sup>3</sup> See 3 Stark. Ev. 1656, note (u.); 12 East, 247, *Henkin v. Guerres*; S. C. 2 Campb. 408; 9 Cow. 169, *Rust v. Gott*; 4 Har. & McHen. 234, *Wroth v. Johnson*; 1 Harrington, 517, *Porter v. Sawyer*.

permission of the government.”<sup>1</sup> Hence, a policy of insurance on enemy’s property is void.<sup>2</sup> So of bills of exchange, promissory notes, and other contracts.<sup>3</sup>

In *Antoine v. Morshead*,<sup>4</sup> it was held that an alien enemy, a Frenchman, to whom a bill of exchange was indorsed, drawn by one English prisoner in France, in favor of another, on a house in England that accepted it, might maintain an action upon it, on the return of peace, against the acceptors. *Chambre, J.*, said this was not a contract between an English subject and an alien enemy. And *Kent, Ch.* (16 Johns. Rep. 471) says the case had nothing to do with voluntary intercourse in the way of mercantile negotiation and trade.

Where an American vessel, pretending to be a neutral, went into Bermudas, and in the character of a neutral obtained credit for repairs, during war—it was held that the owners of the vessel were answerable, on the restoration of peace, to the British merchants who assisted them to repair—on the ground that the plaintiffs were ignorant of the national character of the vessel, and dealt upon the faith that they were trading with a neutral.<sup>5</sup> A license from a British admiral, to protect a ship from capture on a particular voyage, during war between this country and Great Britain, was held not to be a lawful consideration for a promissory note given to the seller by the buyer of the license.<sup>6</sup> A copartnership between subjects of different governments is dissolved, or suspended, by a war between the countries of which the copartners are subjects.<sup>7</sup> A license from the

<sup>1</sup> 16 Johns. 483.

<sup>2</sup> See the cases on this point, *Phillips on Insurance*, 19, et seq.

<sup>3</sup> 7 Taunt. 449, and cases in a note to the American edition.

<sup>4</sup> 6 Taunt. 237.

<sup>5</sup> 16 Mass. Rep. 332, *Musson v. Fales*.

<sup>6</sup> *Patton v. Nicholson*, 3 Wheat. 204. A different decision will be found in 13 Mass. Rep. 26.

<sup>7</sup> 15 Johns. 57, *Griswold v. Waddington*; S. C. 16 Johns. 436; *Seaman v. Waddington*, 16 Johns. 510.

government legalizes the contracts of its subjects with foreign enemies, so far as to enable them to enforce such contracts in the courts of the licensing governments, and to protect the party from prize law.<sup>1</sup>

Ransom bills, &c., form an exception to the rule of law on this subject, as has been before noticed in our third number.

*5. Contracts to obstruct the course of justice, the execution of legal process, or to indemnify officers against nonfeasance, misfeasance, or malfeasance, in their official business.*

Contracts to do acts of this kind, which are punishable as crimes, have already been noticed.

Nonfeasance is the omission of an act which the party ought to do. Misfeasance is the improper performance of an act which may lawfully be done. Malfeasance is the doing of an act which ought not to be done at all.<sup>2</sup>

A promise by a friend of a bankrupt to pay such sums as the bankrupt is charged with having received and not accounted for, if the assignees and commissioners will forbear to examine him respecting those sums, is void for illegality.<sup>3</sup> So of a promise to pay money in consideration that the promisee will not oppose the promisor's discharge under an insolvent law.<sup>4</sup> And of a promise by a third person to pay part of an insolvent's debt, in order to obtain his creditor's signature to the insolvent's petition.<sup>5</sup> And of a promise by a turnpike corporation that certain persons shall be exempted from paying toll at its gates, if they will withdraw their opposition to a legislative act respecting the alteration of

<sup>1</sup> See Mr. Wheaton's note to *Patton v. Nicholson*, 3 Wheat. 207.

<sup>2</sup> 2 *Instructor Clericalis*, 107; *Lawes Pl. in Assump.* 259.

<sup>3</sup> 3 D. & E. 17, *Nerot v. Wallace*. See 6 D. & E. 134, *Kaye v. Bolton*.

<sup>4</sup> 19 Johns. 311, *Tuxbury v. Miller*; 2 Johns. 386, *Waite v. Harper*; 4 Johns. 410, *Bruce v. Lee*; S. P. 3 *Monroe*, 106, *Goodwin v. Blake*.

<sup>5</sup> 9 Johns. 295, *Yeomans v. Chatterton*.

the road.<sup>1</sup> And of a promise by an officer, who had seized goods on an *elegit*, that if the creditor would take out a new *elegit* and deliver it to him, he would procure the goods to be found by an inquisition, and would deliver them to such person as the creditor should appoint: for he was bound to return an indifferent jury.<sup>2</sup> So of an agreement with an officer to permit a prisoner to escape.<sup>3</sup> So of an agreement to indemnify an officer, if he will permit an escape.<sup>4</sup> And of an agreement to deliver an execution debtor to an officer at a future day, in consideration of his forbearing to arrest the debtor when in his presence and power;<sup>5</sup> or to surrender a prisoner on mesne process, or pay the debt and cost, in consideration of his being permitted to go at large until the return day of the writ.<sup>6</sup> Otherwise if the undertaking be to the plaintiff in the suit.<sup>7</sup> If the undertaking be to the officer, he must pursue the statute of 23 Hen. VI. and take a bail bond in his own name.<sup>8</sup> In *Benskin v. French*,<sup>9</sup> a promise to a bailiff to deliver to him, the next morning, a prisoner whom he had arrested—in consideration of his being permitted to remain in the promisor's house during the night—was held to be valid; the court not inferring from the statement that there was an escape, as the officer also might have remained in the house. Whether any judgment was rendered in this case is made

<sup>1</sup> 1 Aik. Rep. 164, *Pingry v. Washburn*.

<sup>2</sup> 1 Freem. 32, *Morris v. Chapman*; S. C. Carter, 223; T. Jon. 24.

<sup>3</sup> *Featherston v. Hutchinson*, Cro. Eliz. 199; S. C. 3 Leon. 108; *Blithman v. Martin*, 2 Bulst. 213; S. C. Godb. 250.

<sup>4</sup> *Plowd.* 60; *Hetl.* 175; *Yelv.* 197; 7 Johns. 159; 7 Greenleaf, 113; 2 Chipman, 11.

<sup>5</sup> 5 Mass. Rep. 385, *Denny v. Lincoln*; 1 Southard, 319, *Fanshor v. Stout*.

<sup>6</sup> 1 D. & E. 418, *Rogers v. Reeves*.

<sup>7</sup> Cro. Eliz. 190, *Milward v. Clerk*; *Aleyn*, 58, *Leech v. Davys*; 2 Mod. 304, *Hill v. Carter*.

<sup>8</sup> 7 D. & E. 110, *Fuller v. Prest*.

<sup>9</sup> 1 Sid. 132; 1 Keb. 483; 1 Lev. 98.

a question in *T. Jones*, 139; and in 1 D. & E. 422, *Buller, J.*, says the case is to be upheld on the ground that the promise was "made on the plaintiff's part," that is, made to the bailiff in behalf of the plaintiff, and thus ranging with the cases before cited from *Cro. Eliz.*, *Aleyn*, and 2 Mod. From the report of this case by *Levinz*, it seems that the action was brought by the original plaintiff, declaring on a promise to the bailiff *ex parte querentis*. And so the matter is stated in *T. Jon.* 139.

By the statute of 23 Hen. VI. c. 9, officers are prohibited to take any obligation of a prisoner who is entitled to be bailed, except to themselves, and in the name of their office; and all other obligations taken upon the enlargement of prisoners, or by color of office, are declared to be void. In most particulars, this statute is merely in affirmance of the common law, and is in force as the common law of many states in the union. All bonds, and other engagements, taken for ease and favor, in contravention of the spirit of this statute, are void.<sup>1</sup> This statute mentions only "sheriffs, under-sheriffs, and other officers and ministers." It has been held that the sergeant at arms of the house of commons is not an officer, within the statute, and yet that a bond given to him by a prisoner ordered into his custody by the house, conditioned to appear, &c., is void by the common law—being for ease and favor.<sup>2</sup> So of a bond, taken by the marshal of the king's bench, who is not named in the statute;<sup>3</sup> and so, it would seem, of a bond given to the sergeant at arms of the marches of Wales.<sup>4</sup>

The statute mentions obligations only; yet all parol

<sup>1</sup> See *Bac. Ab. Sheriff, O.*; *Law of Arrests*, 104, 105; 2 *Johns. Cas.* 239, *Dole v. Bull*; 7 *Johns.* 319, *Richmond v. Roberts*; 8 *Johns.* 98, *Strong v. Tompkins*; 3 *Greenleaf*, 156; 8 *Greenleaf*, 422.

<sup>2</sup> *Hardr.* 464, *Norfolk's case*.

<sup>3</sup> *Cro. Eliz.* 66, *Bracebridge v. Vaughan*.

<sup>4</sup> *Cro. Car.* 309, *Johns v. Stratford*.

undertakings are equally within its purview and spirit.<sup>1</sup> In all cases of bonds and other engagements taken of prisoners by officers, the material question is whether they were given for ease and favor.<sup>2</sup> Obligations for ease and favor are those only which are given to purchase an indulgence not authorized by law. Hence bonds for the debtor's liberties, under statutes which authorize the taking of bonds of that kind in a specified form, are not void, though they are not strictly according to such form.<sup>3</sup> All contracts and engagements between officers and defendants are watched with a jealous eye by courts, in order to prevent oppression under the semblance of indulgence and humanity.<sup>4</sup>

Since the statute of 23 Hen. VI. (if not before) all promises to officers, to induce them to accept bail, are void; for it is their duty to accept sufficient bail when offered: and a contract to accept insufficient bail is void, as it is a contract to violate their duty.<sup>5</sup> Wherever it is the duty of a person in a public trust to do an act, and he exacts a promise from him for whose benefit it is to be done, to compensate him for the service, the consideration is unlawful and the promise void.<sup>6</sup> *A fortiori* is a promise void, when made for the payment of more than the sum provided by law for the performance of any official duty.<sup>7</sup> Demanding and receiving more than legal fees is an indictable offence—may be pun-

<sup>1</sup> 10 Co. 101, Beawfage's case; 4 East, 568, Sedgworth v. Spicer; 7 D. & E. 110; 8 Johns. 98.

<sup>2</sup> See 1 Saund. 161, Lenthall v. Cooke, and notes to that case; 1 Vent. 237; 2 Salk. 438; 1 Freem. 375, Oke's case.

<sup>3</sup> 5 Greenleaf, 240, Baker v. Haley; 8 Mass. Rep. 373.

<sup>4</sup> See 7 Johns. 430, Reed v. Pruyn; 15 Johns. 443, Sherman v. Boyce; 4 Campb. 47, note.

<sup>5</sup> 2 Bur. 924, Stotesbury v. Smith; Highmore on Bail, 28.

<sup>6</sup> 1 Caines, 104, Callagan v. Hallett; 5 Monroe, 529, Mitchell v. Vance; Bac. Ab. Assumpsit, E. See 15 Wend. 44, Hatch v. Mann.

<sup>7</sup> Cro. Jac. 103, Bridge v. Cage; W. Jon. 65, Badow v. Salter; S. C. Latch, 54; 2 Barn. & Ald. 562, Dew v. Parsons; Davis's Justice, 332.

ished by fine—subjects the offender to a *qui tam* action for a penalty—and is a good cause of action for reclaiming the excess in assumpsit for money had and received.<sup>1</sup>

Though an agreement to indemnify an officer for doing an unlawful act is void, yet a bond to save an officer harmless for an unlawful act already done is valid.<sup>2</sup> This stands on the same ground as a bond in consideration of past cohabitation. The consideration is not illegal, and the seal imports a sufficient consideration, or supersedes the necessity of any consideration. A parol promise to indemnify an officer for a past escape, or other misdoing or omission, would generally be *nudum pactum*.<sup>3</sup>

An engagement to indemnify an officer for seizing on execution certain specified goods as the property of the judgment debtor is lawful and binding, although the property may belong to another. And so of an undertaking to indemnify for attaching property on mesne process—where such attachment is permitted by law.<sup>4</sup> So of a promise to indemnify an officer for a false return of *nulla bona*, after an inquisition finding that the property is not in the execution debtor;<sup>5</sup> and of a promise by one, who claims property seized on execution, to indemnify the officer for not selling it.<sup>6</sup>

But if the parties *know* that the property designated does not belong to the defendant or judgment debtor, such contract of indemnity would doubtless be void for illegality.

When goods are seized by an officer on execution, a con-

<sup>1</sup> 1 Hawk. (Curwood's ed.) 419; 2 D. & E. 148, *Woodgate v. Knatchbull*; 2 Esp. Rep. 507, *Jons v. Perchard*; Bigelow's Digest, Fees, B.

<sup>2</sup> 11 Mod. 93, *Hacket v. Tilly*; S. C. 2 Ld. Raym. 1207; Holt, 201; Fox v. Tilly, 6 Mod. 225; *Given v. Driggs*, 1 Caines, 450. See 2 Hall, 579.

<sup>3</sup> See *Sweany v. Hunter*, 1 Murph. 181.

<sup>4</sup> Cro. Jac. 652, *Arundel v. Gardiner*; 5 Pick. 380, *Train v. Gold*; 9 Mass. Rep. 114, *Perley v. Foster*; 4 Mass. Rep. 60, *Marshall v. Hosmer*.

<sup>5</sup> 1 Lutw. 596, *Knipe v. Hobart*.

<sup>6</sup> Litt. Sel. Cas. 273, *Lampton v. Taylor*.

tract to pay the debt, in consideration of his releasing them, is not unlawful. This is entirely different from a promise in consideration of suffering a prisoner to go at large.<sup>1</sup> And it is the constant practice in Maine, New Hampshire and Massachusetts, where attachments are made on mesne process, for the officer to deliver the property attached to a third person, taking his promise to return it, or to pay the judgment that the plaintiff may recover, or an agreed sum, if he fail to return it. This has never been deemed illegal, and such promises have often been enforced by action.<sup>2</sup>

A bond, taken by a sheriff from his deputy and sureties, engaging to indemnify the sheriff against all misconduct of the deputy for which the sheriff is responsible, is not illegal—as its object is not to induce illegal acts;<sup>3</sup> nor a promise of indemnity to a sheriff against the misconduct of a bailiff appointed at the promisor's suggestion or request. In such cases, the act of the bailiff is regarded as the act of the party soliciting his appointment, that is, the plaintiff in the original writ; and the court will not allow the sheriff to be troubled by him in consequence of any negligence or misbehavior of the bailiff.<sup>4</sup>

In all cases of promises to indemnify against unlawful acts, this distinction holds, viz., if the act, directed or agreed to be done, is known, at the time, to be a trespass and unlawful, the promise of indemnity is unlawful and void; otherwise it is a good and valid promise.<sup>5</sup> As if A request B to enter into C's land, and in A's name drive out beasts and impound them, and promise to save him harmless; or to

<sup>1</sup> Love's case, 1 Salk. 28.

<sup>2</sup> 14 Mass. Rep. 195, *Bridge v. Wyman*; 16 Mass. Rep. 8. 453. 464; 3 Greenleaf, 357; 7 N. Hamp. 594.

<sup>3</sup> Hob. 12, *Norton v. Simmes*; Bac. Ab. Sheriff, H. 2; 11 Mod. 93. 94.

<sup>4</sup> Ow. 97, *Dabridgecourt v. Smallbrooke*; S. C. Cro. Eliz. 178; 3 Leon. 227; *De Moranda v. Dunkin*, 4 D. & E. 119.

<sup>5</sup> 1 Pow. Con. 177.



enter another's land and cut down the grass, trees, &c.; or to arrest a designated person on a warrant or writ against one who is unknown to the officer—though the person arrested is not the party against whom the process runs.<sup>1</sup> Thus, where Harcot brought one Battersey to an inn, and affirmed to the host that he arrested Battersey, by virtue of a commission of rebellion, and requested the host to keep him safely over night, and promised to save him harmless—the promise was decided to be binding, though the arrest and imprisonment were illegal.<sup>2</sup> So where a surveyor and commissioner of highways, in New York, ordered a person who was assessed in the highway tax, and was working it out, to take down a turnpike gate, which was considered by the commissioner and surveyor as a nuisance—and promised “to bear him out.”<sup>3</sup> A promise to indemnify an officer for taking, on execution or writ, certain designated goods, as the property of the defendant in the suit, stands on the same ground. In all these and similar cases, the act may be tortious, and the party, who has a promise of indemnity, may be liable as a trespasser, and answerable to the party injured, if he arrest the wrong person, &c. In trespass, all are principals.

The ignorance, which will excuse a wrong-doer, in such cases, and render the promise of indemnity lawful and valid, must be ignorance of facts, or ignorance of the law, as it relates to property, &c. Ignorance of the moral quality of actions, or of the law relating to offences, will not excuse a breach of law, nor render legal an engagement to save an offender harmless, in consideration of his committing a punishable offence.<sup>4</sup> Therefore A's license to B to beat him is

<sup>1</sup> Winch, 49, per Hobart, J. Bul. N. P. 146; 2 Johns. Cas. 56.

<sup>2</sup> Hut. 55; Winch, 48.

<sup>3</sup> *Coventry v. Barton*, 17 Johns. 142; S. P. 14 Pick. 174, *Avery v. Halsey*.

<sup>4</sup> See 1 Comyn on Con. 1st ed. 31; 1 Pow. Con. 166; 1 Lev. 174, *Allen v. Rescous*.

void, though it is tantamount to a promise not to seek redress for the injury; for the beating is a breach of the peace, and indictable.<sup>1</sup>

All contracts, the object of which is to induce an omission of duty, are unlawful and void, no less than those which are made for the purpose of encouraging the commission of unlawful acts.<sup>2</sup>

T. M.

<sup>1</sup> Bul. N. P. 16; Comb. 218, *Matthew v. Ollerton*; 1 Hawk, 420, *Stout v. Wren*; 1 Stewart, 476, *Logan v. Austin*.

*Quere*, whether an action would lie for a blow received in those exercises that prepare for the defence of the country, or in mere athletic exercises, where the necessary consequences of the exercise are not detrimental to the party? See *Keilw.* 136, a.; 1 *Mod.* 136; 3 *Inst.* 56.

In the *Mirror*, ch. I, sect. 13, is this passage: "Of misadventures in turnaments, in courts and lists, king Henry the 2 ordained, that because at such duells happen many mischances; that each of them take an oath that he beareth no deadly hatred against the other, but onely that he endeavoureth with him in love to try his strength in those common places of lists and duells, that he might the better know how to defend himselfe against his enemies; and therefore such mischances are not supposed felony, nor the coroners have not to doe with such mischances which happen in such common meetings where there is no intent to commit any felony." See 1 *Hale P. C.* 472; *Foster's Crown Law*, 259, 260.

<sup>2</sup> 2 *Johns.* 193, *Goodale v. Holridge*; *Mo.* 856, *Norton v. Syms*; 2 *Bay*, 67, *Greenwood v. Colcock*; 7 *Greenleaf*, 113, *Hodson v. Wilkins*.

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## ART. II.—BIOGRAPHICAL SKETCH OF JOHN WALLEY.

THE time or place of the birth of judge Walley, we have not been able to ascertain. He resided in Boston until his removal to Bristol, then in the Plymouth colony, about the year 1680. He was led to make this removal in consequence of his having become one of the original proprietors of the peninsula of Mount Hope, which was conveyed to him and his associates by the general court of Plymouth. Among these associates was colonel Byfield, who was for

many years one of the most distinguished men in the province.

While Mr. Walley resided in Boston, he became a member of the ancient and honorable artillery company, and rose to be its commander, a mark of no inconsiderable distinction, in 1679. In the historical sketch that is given of that company, he is spoken of as "a private citizen," but it does not appear what were his pursuits in life until his removal to Bristol.

In 1684, he was elected one of the assistants of the Plymouth colony, and was annually elected to that office, until the arrival of governor Andros, of whose council he was named a member.

At first, he was willing to act in the capacity of counselor to the new governor of New England, but seems not to have been found sufficiently subservient to his will to be retained in the executive confidence.

Upon the deposition of Andros, as governor, the Plymouth colony resumed their charter, and organized their government anew upon its former basis, and Mr. Walley was again made an assistant, and continued to be a member of that board till the final union of the two colonies of Massachusetts and Plymouth under the charter of 1691.

The year 1690 was long memorable for the unfortunate expedition against Canada, in which Mr. Walley bore a conspicuous part. The colony had suffered so much from the incursions of the Indians upon the white settlements, to which they were instigated by the influence of the French who then held the province of Canada, that it was at last resolved, in the winter of 1689, to raise an expedition to attack the enemy in their strong holds of Quebec and Montreal. Connecticut and New York came into the arrangement and agreed to furnish their quotas of troops.

Sir William Phipps was selected as commander in chief of this expedition, and a part of the original plan, which

had in view the reduction of Port Royal and taking possession of the coast lying east of the New England settlements, was successfully accomplished under his direction in the early part of the year 1690. The expedition against Canada was delayed until August, when it sailed from Nantasket, and consisted of thirty-two vessels in all, the largest carrying forty-four guns and the whole number of men being about two thousand. Mr. Walley was appointed commander in chief of the land forces under sir William Phipps.

The reason of selecting him for so important an enterprise, is not known; nor did the result of the enterprise redound to the honor of either of its commanders. It was so late in the season before it sailed, and so wholly unprovided were they with pilots that it was the 5th of October before the fleet reached Quebec. In the mean time the New York troops had failed to enter the province by the way of Montreal, as had been designed, and the consequence was that the New England troops found themselves destitute of suitable provisions at the commencement of a rigorous and tempestuous season, and compelled to engage with an enemy who were sheltered by their fortifications and in a good measure prepared to repel their attacks.

A landing of the troops was effected, but after a few days skirmishing on shore, and an entirely ineffectual attempt by the fleet to batter down the walls of the town, the forces were reembarked and returned to Boston.

The failure of this expedition was a great blow to the hopes of New England. The possibility of defeat seems not to have entered into the counsels of those who planned it. The expedition against Port Royal had more than repaid its outlays by the spoils taken from the enemy, and no plan had been devised to meet the expenses of the enterprise against Quebec in case of its failure. As the last resort to meet these expenses, the government issued bills of credit with which to pay the soldiers who had served

in the expedition. It was a new experiment upon the currency, and although it found but little favor at the time and but poorly answered the purpose for which it was designed, it was the precedent for subsequent issues of government bills, which in the end proved so ruinous to the trade and prosperity of the province.

In the general disappointment felt by the people at the failure of the Canada expedition, it was not possible that its officers should escape severe censures. Such was the case in regard to general Walley, but no public inquiry into his conduct was ever instituted. He made a full report of the management of the expedition to the general court, which is published in the appendix to Hutchinson's History of Massachusetts. And however much we may doubt the competency to plan, or the energy to execute a military expedition on the part of the commanders of the naval and land forces that were sent against Quebec, it is not necessary to impute blame to them in order to account for the failure of the enterprise.

General Walley continued in public life and was named as one of the first board of councillors under the new charter. Although he is said to have been an extremely amiable man, he was unfortunate enough to become involved in an unpleasant controversy with Mr. Saffin, who afterwards, as one of the judges of the superior court, was associated with him in that capacity.

An account of this controversy is preserved in Baylies' history of Plymouth colony, and may be deemed of sufficient interest to be referred to in this connexion, as it may tend to throw light upon the character of the parties concerned in it.

Mr. Saffin had published a pamphlet in which he reflected pretty severely upon the characters of Mr. Walley and colonel Byfield, which was submitted to lieutenant governor Stoughton, Isaac Addington, and John Leverett as arbitrators

between the parties who awarded that a retraction of the charges should be made and published.

The manner in which this award was performed is more singular than the original controversy itself. After stating that "if a breach of promise to a person or people, in a matter of great concernment, be no evil," and so repeating his various charges at large in the form of an hypothesis, Mr. Saffin proceeds: "I say if these and such like strange actions and doings before mentioned (all which they have either owned or have been proved to be done by them) be warrantable, legal, just and right in the sight of God, or according to the laws of the nation, then I do hereby own and humbly acknowledge, that I have done the said major John Walley, and captain Nathaniel Byfield, much wrong and injury in rendering their said actions in my narrative to be illegal, unjust, and injurious to the town of Bristol in general, and to myself in particular, for which I am sorry."

"I confess I might have spared some poetical notions and satirical expressions which I have used by way of argument, inference or comparison. Yet the sharpest of them are abundantly short of those vilifying terms and scurrilous languages which they themselves have frequently given each other, both in public and private, generally known in Bristol."

"But above all, I am heartily sorry that it is my unhappiness to differ so much in my apprehensions from the honorable gentlemen the arbitrators, &c."

This "*confession*" bears date in July, 1696, and as the temper of judge Saffin was notoriously irascible, and as the arbitrators, all of whom were at some time during their lives, judges of the superior court, acquitted judge Walley of blame in respect to the charges which his adversary had made against him, we are bound to suppose that the charges were not well grounded.

At any rate, he so far retained the public confidence, that,

in 1700 he was nominated to the 'bench of the superior court, in place of judge Danforth, and was confirmed, as judge Sewall states, by all but one of the votes of the council.

It is not easy to understand the claims of Mr. Walley to a place upon the bench, beyond his general respectability and public services; for his fitness for the place, in whatever it might have consisted, must have been the result, rather of practical experience in the affairs of life, than of any preparation by study or reflection, for the performance of its duties.

He must, however, have been acceptable to the government, at least, for he remained upon the bench until his death in 1712, during the administration of governor Dudley, who seems not to have hesitated to exercise the prerogative of punishing his enemies at pleasure, by removing them from all places of trust and power.

Judge Walley died in Boston on the 11th of January, 1712, at the age of sixty-eight, and was succeeded by judge Lynde, who was the first regularly educated lawyer that ever sat upon the bench of the superior court, in Massachusetts, under the province charter.

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### ART. III.—CODIFICATION AND REFORM OF THE LAW.

#### No. 8.

[Although the discussions in this article relate to statutory regulations which have been made in a single state, the subjects considered are of general interest and not of a local character merely. The changes which have been made in the state of New York have been in a great measure conformable to the recommendations of the English real property commissioners, and have been subjects of great consideration, wherever the common law has been acknowledged. We regard most of the proposed reforms, by the revisers of the New York statutes, as fundamental, and many of them as subversive of the law of real property.]

THE rules of law in relation to the limitation of estates in real property have been reduced to great certainty, and as

they are capable of being applied with mathematical precision, the cases which have been decided, when subjected to a proper analysis, present a consistent and noble system, which perhaps could derive no higher sanction from being reduced to a legislative code. This is eminently true of the doctrine of contingent remainders. If, in certain cases, fundamental rules have been departed from, those decisions cannot mislead, nor can the system itself be perverted by them, because the rules themselves are not arbitrary, but founded in the nature of things, and when truly applied, lead to direct and absolute results.

It would no doubt, nevertheless, be very desirable, that the principles upon which decided cases were founded should be collated, and that the necessity of reverting to confused and interminable reports should be obviated. It may well be doubted whether any change might beneficially be made in the law of contingent remainders, and if changes were attempted, their consistency would be a consideration of the last importance. It is provided in New York, (Revised Statutes, vol. 1, p. 723,) that the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case of the minority of the persons to whom the first remainder is limited. It is also provided, that no expectant estate shall be defeated or barred by any alienation, or other act of the owner of the intermediate estate, or by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise, except by some act or means which the party creating the estate shall, in the creation thereof, have provided for or authorized; and that no remainder shall be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; and that should the contingency



afterwards happen, the remainder shall take effect in the same manner, and to the same extent as if the precedent estate had continued to the same period. The changes which have been wrought by these enactments, together with the provisions restraining the alienation of trust estates, as affecting subsequent contingent interests, and those in the same act relating to contingent remainders after estates tail, are of deep moment, and we propose to consider their consequences and bearing. The policy of the ancient law was to preserve unimpaired the power of alienation. To that end the rules of law were adopted, whatever other fanciful or unsatisfactory reasons were assigned for them. If the law had allowed future estates of freehold to be created, it must have permitted the power of alienation to be suspended until the future estate should take effect. It is for this reason, that estates of freehold in remainder must be limited to take effect upon the regular termination of the precedent estate, and not at any interval after its termination.

An estate for years may be created with a vested remainder in fee, and the precedent estate for years is but a part of the freehold, and when it expires the remainder takes effect in possession. A contingent remainder cannot be created upon an estate for years, because as there is no estate capable of livery, the power of alienation would thereby be suspended.

A contingent remainder may be limited after a freehold, because livery may be made to the tenant of the freehold who is capable of aliening the estate by feoffment. If the precedent estate is destroyed in any other way, the contingent future estate is destroyed, because if effect could be given to it, it would suspend the power of alienation, which was maintained whilst the precedent estate continued. Feoffment by the tenant of the freehold in possession bars the contingent remainder, because it passes the whole estate.

There is a distinction between a feoffment by a tenant of the freehold, and a feoffment by the tenant of an estate less than freehold, although both *ransack the estate*. Both are said to be wrongful; but the feoffment by the former is the exercise of a power inherent to his estate. The tenant for years must acquire a freehold by disseisin, to enable him to pass a freehold by his feoffment.

The feoffment by tenant for life is wrongful only in respect to the reversioner or heir who has the possibility of a reverter, and not in respect to the remainder-man, when the estate in remainder is contingent; and although the former may enter for the forfeiture, the entry does not and cannot enure to the benefit of him in remainder, if the remainder is contingent. Although the feoffment by the tenant for life is wrongful, the reversioner may waive the forfeiture, so that when there is an estate of freehold, with a remainder limited thereupon, there are persons in possession, who, by legitimate conveyances, recognised as such by law, are capable of regularly aliening the estate.

The feoffment by tenant for years is tortious, and can only take effect by *destroying the tenancy* by the disseisin of the reversioner. It cannot be a legitimate conveyance, for a concurrence between the reversioner and tenant cannot be supposed. The act of the tenant disseises the reversioner, and the feoffment of the reversioner displaces the tenant. As no legitimate alienation could be made, therefore, by the tenant for years and the reversioner, if a contingent future estate might be limited upon an estate for years, the law does not permit the power of alienation to be suspended by a contingent freehold limited after an estate less than freehold. It appears, then, that the substantial reason, that a contingent remainder requires an estate of freehold to support it, is, that when such an estate is the precedent estate, the power of alienation is maintained.

What then is the legal effect of a conveyance to one for

life, with a remainder to the right heirs of another then living, in which case the remainder is contingent? Manifestly, it is in effect a grant for life with a power as incident to the estate of passing it by feoffment, with a remainder to take effect in the right heirs of the person living, provided the estate is not aliened by the tenant for life, before the time for the vesting of the remainder. The effect of a limitation for life, with a contingent remainder in fee, therefore, is merely to point out the course which the estate shall take, provided the tenant for life does not exercise the power of alienation, which by legal seisin the law has invested him with. The estate of the tenant for life is absolute, except as it regards the inheritance. It is capable of being aliened by the tenant for life, by a mode of conveyance as effectual, except as against the reversioner, as that of the tenant of the fee simple estate: although it follows the course of limitation, if the power of alienation is not exercised, in the same manner that an estate in fee simple follows the course of descent.

This conclusion would seem to be obvious, because a feoffment by the tenant for life has always had the effect to pass the estate; no remedy has been provided for the contingent interest, and yet no wrong is permitted by the law, without a remedy capable of being in some form administered. On the contrary, all rules of law relating to future interests have been founded upon the efficacy of a feoffment by tenant for life to destroy the uncertain tenure of contingent estates. Even if the grantor should provide, that no act of the tenant for life should be effectual to bar the contingent remainder, the declared intention of the grantor would have no effect to prevent the regular operation of law.

The rules of the common law, which were originally applied to devises as well as deeds, were at length relaxed in favor of executory devises, by which the power of alien-

ation was permitted to be suspended for a life or lives in being, and twenty-one years thereafter. In this mode, a future estate of freehold might be created, or an estate of freehold might be limited on an estate for years, and the estate for years on which a freehold was thus limited might be an estate for any number of years.

When an estate for years is devised, a partial interest only is created by the devise of the term, and the residue of the estate remains in the heir. When after the estate for years an estate of inheritance is devised, it vests as a remainder when it is capable of vesting. When the devise is incapable of vesting, it is an executory devise which must vest within the time prescribed by law, and the reversion until the devise vests in interest descends to the heir. When a person has come *in esse* who is capable of taking a vested estate, or when the event has occurred on which the estate was to vest, then the freehold or the reversion on the term of years has vested in him and the power of alienation is complete. As the termor and reversioner or remainder-man by uniting in a conveyance, are capable of transmitting the whole estate, so, in no case, however extended the term of years may be, is there, by the length of the term merely, a suspension of the power of alienation beyond the period allowed by law.

When an estate is devised for a long term of years, although the term may endure far beyond the time allowed by law for the vesting of the freehold, still if the devise of the freehold must take effect within a life or lives in being, and twenty-one years thereafter, it is within the rules of law, because the estate then vests in the devisee subject to the term for years.

Such was the law in regard to grants and devises in the state of New York, before the great change effected by the revised statutes of that state. A contingent estate can now only be limited by grant or devise after two lives in being, but if the estate which precedes the contingent remainder is destroyed, the contingent estate must continue.

By these provisions, the entire policy of the law in regard to the full alienation of land is changed: the power of transmitting the estate being suspended until the contingent estate vests. In the mean time, no action can be brought against the owner for any wrong relating to the land, or for any omission of duty. Every cause of action must be suspended until the contingent interest vests. In the ancient language of the law there is no *tenant to the præcipe*.

As the statute has been construed, it confounds the rules of real property, and introduces new principles which are inconsistent with themselves, and apparently impracticable. By the policy of the common law, the vesting of the freehold was alone regarded in reference to the power of alienation, terms for years being mere chattel interests. An estate for years was always considered as less than an estate for life, however long the term might be, because in the view of the law a term was less than the freehold. The whole term vested in the first tenant for life, and like any other chattel, was originally subject entirely to his disposal, whatever future or contingent interests were limited in the term. This doctrine was subsequently somewhat changed, and the power of the tenant over the term was circumscribed; but in giving effect to limitations of the term in devises, the paramount principle has been maintained, of preserving to the persons to whom the term was limited, and the tenant of the freehold, by uniting in a conveyance, the absolute and unrestricted power of alienation.

The power of free alienation was strictly preserved in all limitations, whether in a term, or of the freehold, by *common law conveyances*. To sustain it in *conveyances to uses* was the great purpose of the struggle in Chadleigh's case to preserve the subtilty, as it has been regarded, of the *scintilla juris*; and it was only relaxed, as we have observed, in favor of *executory devises*, to prevent the heir from disappointing the intent of the devisor.

But all these rules have been entirely subverted in the state of New York, by the effect of the statute under consideration, whilst the distinction between terms for years and the freehold appears for some purposes to have been broken down, although an estate for years is still regarded as a chattel.

The design of the statute is to give effect at all events to limitations for two lives, whether in terms for years or in the freehold, within the limits prescribed, and without regard to the manner in which they are created, whether by deeds or by devises; whilst it is provided that the power of alienation shall not be suspended by limitations in a term or a freehold for more than two lives.

In the case of *Hawley v. James* (16 Wendell's Rep. 124,) the construction given to the statute was, that the power of alienation could not be suspended at all, except for lives, that such a suspension was not admissible by the creation of an inalienable estate for any the smallest period of time, independent of lives, and that a contingent limitation, after a short term for years, was therefore void.

The court must have arrived at this conclusion, from supposing that the statute had entirely subverted the established law in regard to an executory devise of the freehold subject to a term of years, and that it had confounded the distinction between estates of freehold and estates less than freehold; and if such is the result of the changes made by the revisers, they furnish a striking illustration of the danger of departing from established principles, founded as they are upon rules of mathematical truth, and of substituting a set of imperfect and incongruous regulations for a system which was adapted to every modification of property.

As an estate for years was not considered in the law as more than a chattel interest, it was unimportant as it regarded alienation, whether it was a long or a short term. The freehold was the only interest in the land which was

regarded, and when it was subject to a term of years, it was the estate in the reversion only which was subject to the rules of law in relation to the creation of estates in real property.

In certain cases, some confusion has resulted from considering this reversion as a remainder, and from viewing it as a remainder after a term for years. As such it could not at common law take effect and vest after the term, either as a contingent remainder created by deed, or, except in the case where the term does not exceed the minority of an infant, as an executory devise. It is important that the distinction should be regarded.

When an estate for a long term of years was given by deed, the remainder might be limited to one for life with a contingent remainder to another in fee. In this case, both estates of freehold are carved out of the reversion, and though they may never take effect in possession, the reversionary estate is alone regarded in the law.

It is probable that in the case last stated, under the New York statute, the contingent estate in fee would not be sustained, though preceded by a vested estate of freehold, because limited after a term of years; but if the contingent estate may be regarded as a valid limitation, it would be sustained by the provision of the statute, even if the precedent estate of freehold should be destroyed. If the law may be construed to authorize such a limitation, a strange inconsistency is exhibited, because when a contingent estate is created out of a reversion on a term of years, it must at the time of its creation be supported by a precedent estate of freehold in the reversionary interest, although if that estate of freehold is destroyed, the contingent estate will still continue to exist.

When an estate was devised for a term of years to one, with remainder to his children when they should attain the age of twenty-one years, the estate would vest in posses-

sion when the children attained majority, and might be regarded as a remainder, if limited so as to take effect at the precise termination of the term, but if limited to take effect before the term for years should expire, it would be an executory devise of the reversion of the term.

It appears, therefore, that at the common law the devise of a freehold, subject to a term of years, might take effect as a *remainder on minorities*, or as an executory devise of the freehold, according to the circumstances of the case. This doctrine was at one time denied in Westminster hall, as appears by the first certificate of the judges in the case of *Gove v. Gove*, but on the final argument the true principle was adopted, and has since been uniformly observed, though in the construction given to the statute in question, in the case of *Hawley v. James*, above cited, it was lost sight of.

If, as in the case of *Gove v. Gove*, a term of five hundred years is granted, the freehold still remains in the grantor as his reversion. If at common law the grantor afterwards conveyed the land subject to the term, a vested estate must have been granted. If he devised the land, the freehold might be devised on a contingency which should happen within a life or lives in being, and twenty-one years thereafter. In New York, since the statute, the freehold may be *granted* as well as devised on a contingency to happen within the limits prescribed.

At common law, if the freehold is limited in the *same conveyance* in which the term of five hundred years is granted, it must be so limited as to vest immediately. If the term is created by devise, the freehold must be devised so as to vest within the above mentioned limits; and in New York, since the statute, devises and grants are in this respect placed upon the same footing, but, from overlooking the principle established in *Gove v. Gove*, and from confounding the distinction between estates, it appears that the framers of the statute have made the validity of the limitation of



the freehold to depend upon the nature of the estates limited in the term.

It was decided on a devise in the case of *Hawley v. James*, that since the statute, when a contingent estate was limited to persons in being, upon more than two minorities, and to take effect upon the death of the minors within the term, the limitation was extended beyond the period allowed by law, of two lives in being, and therefore could not take effect, although the precedent estate could not possibly endure beyond the period of twenty-one years. It was supposed to be the intent of the framers of the statute that a limitation after an estate for years should not vest, when the estate for years depended upon more than two lives. When it was provided that an estate, devised to more than two infants, during their minorities, should cease, and go over on the death of the infants, during their minorities, the estate, was considered as an estate dependent upon lives. The court were of opinion, (16 Wend. Rep. 124, 125,) that estates during minorities were terms for years, and that if the estates depended upon minorities exclusively, they would be estates for years, determinable upon the ceasing of the minorities, but that when the estates were made to cease by death, they were determinable by lives, and that by combining minorities, they were made estates for lives and minorities together.

But such a precedent estate is undoubtedly an estate for years simply. It is clearly not an estate of freehold. It cannot possibly endure beyond the term of twenty-one years, and the lives upon which the estate is made determinable may hasten the termination of the estate for years, though they cannot possibly extend its duration. An estate for life must be limited for the whole life, and when it is provided that an estate shall come to an end at a certain ascertained period, it cannot be considered an estate for life, though it may chance to endure beyond the life of the

tenant, and though the interest of the tenant may be made to determine with the life. When an estate is limited to a person for twenty-one years if J. S. shall so long live, it is an estate for years only; not an estate for the life of J. S., because there is a *fixed period* beyond which it cannot last. 1 Inst. 45, b.

A strange, anomalous principle, however, appears to have resulted from the confusion of estates in the New York statute, namely, that when a precedent estate for years is made determinable upon more than two lives, then the estate is void which is created by way of executory devise of the reversionary interest on the estate for years, in the same manner, as if the limitations in the term had been limitations of the freehold, and that no contingent limitations are admissible by deed or devise, after a term of years, unless the limitations of the term constitute a *quasi* freehold. The following instances will show the absurd operation of this statute.

If an estate is given to three persons of the respective ages of 10, 15 and 20, during their minorities, with a *contingent remainder* over at the period of majority, but to vest at an earlier period in the event of their death before that time, the remainder is void, because, though the precedent estate is dependent on minorities, and cannot exceed eleven years, it is also determinable upon more than two lives; but if the same estate is given to the three persons of the respective ages mentioned, during their minorities, with a contingent remainder over, to vest on their attaining the age of twenty-one years, the remainder is good, though the only difference between the cases stated is, that in the former the contingent estate vests earlier than it would have done if the precedent estate had not been determinable upon lives.

If an estate is given to three minors during their minority, with an *executory devise* to vest absolutely at the end of

the term of years which the minority constitutes, the limitation is good, even at the common law, though if the estate is vested by the devise on the death of the infants during minority, the limitation is void by the statute in question.

If a trust term is created by devise for the benefit of more than two minors, determinable on the lives of the *cestuis que trust* during the term, with the remainder over to a person in being, the remainder is void, on the principle stated: but it would seem that if the term is absolute, and is limited so as to pass to the personal representatives of the minors at their decease within the term, the limitation of the future estate is valid.

Although when an estate is given to three minors determinable upon their deaths during minority, the contingent estate limited after the term is too remote, notwithstanding it must vest, if it takes effect at all, during, or at the end of the minorities, an estate may be limited to any number of minors with a contingent interest thereupon, to vest at the death of any two of them *during the term* of their minorities, or whenever their lives may cease *thereafter*, and thus the power of alienation may be suspended during the continuance of two lives after the precedent term. In the former case, the power of alienation is not allowed to be suspended during the lives of three persons, although those lives are circumscribed by a term which cannot exceed their joint minorities, and in the latter case it is allowed to be suspended during the term, and also during the possible continuance of two lives, which may endure far beyond the period which in the former case would be considered too remote. Such are some of the results of the changes made by the statute on this subject. They have involved the whole law of contingent remainders and executory devises in confusion, by subverting well established and fundamental principles.

In the case above mentioned of *Hawley v. James*, the court expressed the opinion, that the legislature had by an oversight omitted to provide for the suspension of the power of alienation for a short term of years, equivalent to the average duration of two lives. We entertain a different opinion. The obvious design was, for certain purposes, to abolish the distinction between terms for years and estates of freehold, to make the estates of the tenants of the term, during two lives, as certain as the estate of the tenant of the freehold, and to limit the powers of the tenant of the latter estate.

As the statute had provided that a contingent estate, which was lawfully limited at the time of its creation, should at all events take effect on the happening of the contingency, a contingent interest in the term was protected equally with a contingent estate of freehold. It became therefore necessary to restrain limitations of the term, so as to prevent the undue restriction of its alienation.

By permitting a term for years to be created with a contingent limitation thereon, the immediate result would not be a suspension of the power of alienation beyond the limits allowed by law, but the tenant of the term might limit his estate by deed or devise, so as to suspend the capacity of alienation for two lives under the statute, and thus the power of alienation would be suspended, during more than two lives.

If it had been the policy of the statute, to allow the estate to be limited in strict settlement for any given number of years, the rule would have been applied equally to limitations of the freehold, whereas the rule of the common law is only continued by the statute in reference to the minority of a tenant of the freehold.

At the common law, as an estate for years was a mere contract, such an estate might be created, to commence *in futuro*, the freehold remaining in the grantor; but it would seem that in New York, since the statute, the creation of an

estate for years to commence *in futuro* would not be admissible, because as it is required that the power of alienation should be preserved over the whole estate, and not in the freehold merely, subject to the term of years, the term might be so limited as to suspend alienation during its continuance.

But however this may be, when a future estate for years is thus granted, the freehold in the grantor cannot, whilst subject to the term, be limited in strict settlement for one or two lives, for the same reason that a contingent interest cannot be limited to one after an estate for years.

Although the common law sedulously preserved the power of alienation, this capacity of alienation was regarded as inherent to the estate, and not as personal to those in whom the estate vested. The estate might vest in an idiot, in a married woman, or might be continued in a succession of infants; still if the incapacity affected merely the tenants of the estate personally, and did not grow out of the limitations of the estate, the object of the law was fulfilled, because the disability resulted from the policy of the law, and not from the remoteness of the estates limited.

Humanity and policy required that idiots and lunatics, women under the restraint of coverture, and infants, should be placed under the immediate guardianship and in the custody of the law. But the law which protects the property of persons when under disability provides in a suitable manner, when the interests of those persons require it, for the disposition and alienation of their property. By an act of the legislature, or by the action of those to whom the power of the legislature may be delegated, the property and all the rights of the idiot, the infant, or the married woman, might be conveyed as fully as if they had themselves been competent to convey.

In England, the superintendence of these persons is in the court of chancery, and in most cases the chancellor repre-

sents as well as protects their interests; but the united power of the trustee, the chancellor, and parliament, in all cases, is adequate to the alienation of property, the power of conveying which is suspended by reason of a personal disability. The policy of the law is thus satisfied, and even in cases where the disability is created by express enactment of law, the same power is capable of removing the disability which imposed it, or of passing the estate notwithstanding its existence.

Even if an act of parliament expressly prohibited, *totidem verbis*, the sale of an estate by trustees, the power of alienation is not absolutely suspended, for by the repeal of the act the power is restored; as the restraint is not of the character of a limitation of the estate, which by its remoteness renders a conveyance impracticable. If the testator in a devise to trustees expressly prohibits the sale of an estate, this is no more than is implied by law in *active trusts*, and yet it has been understood that those who were interested in the trust under the direction of the court of chancery would have the power of disposing of the trust estate.

In another point of view, a restriction which is imposed by law, and which does not grow out of limitations of the estate, is not within the scope of the policy, which provides for the freedom of alienation. Unobstructed alienation is the general rule applied to the mass of property. Personal restrictions are the exception, where the general rule yields to a higher policy and a commanding equity.

But in the state of New York, the same statute which provides that the power of alienation may be suspended *absolutely* during two lives in being, also provides that trustees to whom estates are limited shall never convey even with the concurrence of the persons interested in the trust. In the case of *Coster v. Lorillard*,<sup>1</sup> and *Hawley v.*

<sup>1</sup> 14 Wend. R. 265.

James, it was decided by the court of errors of that state, that in cases where active trusts were created by will, the power of alienation was suspended, as contemplated in the statute, by the creation of such a trust, and that a contingent estate limited on two lives after such a trust estate could not be sustained.

The effect given to this provision of the statute displays the danger of introducing rigid, inflexible rules, in place of the principles of equity jurisdiction, so admirably adapted to sustain and help out the design of legal conveyances.

It certainly was a most unnecessary and harsh provision, which deprived the chancellor of all power over trust estates, even when his interposition is sought by the parties interested in the trust; and severe indeed is the principle which makes the *form* of a precedent estate, not inalienable by act of the parties, but merely by arbitrary rules of law, the means of defeating an estate limited upon it, because by a personal disability of the party beneficially interested, it operated to suspend the practical power of alienation.

The statute (sec. 47) provides that the party beneficially interested shall have the entire legal estate, except so far as it must vest in the trustee to enable him to execute his duties. The estate of the trustee, therefore, is created for a limited purpose, and is ancillary to the beneficial interest.

It is peculiarly proper that the active duties of the trustee should be subject to the cognisance and direction of the chancellor, and that the estate should be moulded or applied, when the trust is executory, according to the broad principles of equity.

If the effect of the statute is to make all trusts, during the existence of its provisions, inalienable by the concurrent action of the *cestui que trust*, trustee and legislature, however imperative the reasons may be for aliening the estate, its design is still more remarkable, and no other reason for its adoption can well be imagined, than (by making trust

estates odious) that of bringing them altogether into disuse.

But a principle entirely novel seems (by the construction of the court) to have been introduced into the statute. The design of the common law was to prevent a suspension of the power of alienation by the limitation of estates. The failure of the power of transfer by the *operation of circumstances* is not regarded as an evil to be prevented by law.

The common law regarded merely the vesting of the estate, and its policy was to prevent the inheritance from being in suspense on contingencies. It required that there should be at all times, if possible, a tenant to the præcipe, and when there was a person capable under the limitations of being such, the power of transfer and all other incidents of the inheritance existed. The right of regulating and controlling the exercise of certain powers incident to the inheritance was to a certain extent, under the guardianship of chancery, given to the grantor or devisor. No injurious consequences resulted from the imposition of such personal restraints, because by the salutary jurisdiction of a court of chancery the power of transfer was sufficiently exercised. But the statute in question in one breath imposes the restriction, which in part withdraws from the tenant of the estate the incidents of the inheritance, and in another provides that the effect of the partial restriction of the rights of the inheritance shall be to render void subsequent limitations, otherwise within the rules of law.

The grantor or devisor limits an estate which at the common law would have been capable of transfer, and imposes no restrictions upon any of the powers incident to the inheritance; and the statute interposes and declares that such an estate shall be construed as an estate incapable by its limitations of being aliened, and that other estates limited upon it, as if an alienable estate, shall be void. We are strongly inclined to the opinion that such a provi-



sion, (if indeed such a construction can fairly be given to the statute,) is calculated to involve the principles of the law in confusion, and that in its tendency it is impolitic.

Whilst courts have always been solicitous to maintain the intention of parties to conveyances, and to carry into effect all their frivolous or strict arrangements for those who are to succeed them, by a strange inconsistency, the courts and the legislatures in most of the states have refused to permit entails to exist at all, a strong popular feeling having always prevailed against them.

In New York all estates tail have been turned into estates in fee simple absolute; so that if an estate is given to a man and the heirs of his body, the tenant in tail may defeat the limitation to the issue, though a contingent limitation in remainder will be protected.

The fourth section of the statute which we have been considering provides, that when a remainder in fee shall be limited upon any estate which would be adjudged a fee tail, according to the law of the state as it existed previous to the time when estates tail were converted into estates in fee simple, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession on the death of the first taker without issue living at the time of his death.

The object of this statute is to protect the contingent remainder limited upon an estate tail, though the tenant in tail has the power of destroying the expectant estate of the issue.

It was probably supposed by the framers of the statute, that there was an analogy between a contingent estate after an estate tail, and a contingent interest after an estate for life, and as the remainder in the latter case was sustained notwithstanding any act of the tenant of the freehold to destroy it, that the conveyance of the tenant in tail ought not to be permitted to destroy a remainder limited upon his estate.

The statute had regard to the intention of the *donor* in tail and restrained the operation of the conveyance to the estate of the tenant in tail and his issue.

But if the policy of the statute does not require the maintenance of the free power of alienation, why should the act of the tenant in tail be permitted in any degree to countervail the intention of the donor, so far as it can have effect within the general limits allowed by law? The intention of the donor, in creating an estate tail, is in effect to constitute a tenant for life and a continued succession of tenants, with a remainder to take effect on the failure of the line of the tenant. Consistently with the policy of the statute, that intention might be carried out so far as to give the powers of a tenant for life, (as restricted in the manner we have shown by the statute) to the tenant in tail, with a fee simple estate to his issue, remainder to a person in being.

But the terms of the existing statute are incongruous and inconsistent. In the first place, an estate in fee simple is created for the purpose of vesting the whole estate in the tenant in tail, contrary to the intention of the donor, and then in a subsequent section it is provided, in effect, that notwithstanding the alienation of the tenant in tail, the intention of the donor shall take effect so far as it regards the contingent remainder. All the advantages contemplated by the statute as resulting from giving the power of alienation to the tenant in tail are lost, because the contingent estate must at all events have effect on the happening of the contingency, and the intention of the donor is only in part, and that a comparatively unimportant part, preserved.

If a man limits an estate to his son and the heirs of his body, with a contingent remainder to a remote collateral relation, the estate of the grandson is capable of being defeated, though the remote and contingent interest of the

remainder-man is sustained. No reason for this enactment can be imagined except that of preserving the uniformity of the design to continue the estate in abeyance, whenever a limitation is made upon a contingency. The evils attending such a policy we have already suggested, and to these may be added the gross incongruity resulting from the provisions relating to estates in fee tail, by which the fetter of entails is in part restored, and the substantial and principal intention of the donor is disappointed.

Such is the design and the operation of the changes which have been made by the revised statutes of the state of New York in regard to the famous doctrine of contingent remainders. Substantially, the rules which have been slowly and reluctantly adopted by the courts in support of executory devises have been extended to limitations of estates by common law conveyances, though the power of tying up estates in strict settlement has been reduced to two lives in being, instead of being extended to all the "candles" which were concurrently wasting.

The practical operation of this *restriction* to two lives will be confined to cases of unfrequent and rare occurrence, but the absolute suspension of the power of alienation for two lives in a commercial community will be attended with consequences extremely prejudicial, as the duration of the suspension may sometimes extend to a very remote period. It may thus happen that improvements in a populous city will be suspended for a great length of time, to the entire destruction of its most important interests.

We entertain the opinion that the relaxation of the old rules of the common law, by which the free course of alienation was at all times preserved, has been attended with the worst consequences. The whimsical arrangements which men *in extremis* have been encouraged to construct, instead of passing their property to those who on reasonable principles were entitled to its enjoyment, have been

the least of the evils which have sprung from the system. But we think it is truly unfortunate that such a mass of property is permitted to be set apart and the power of alienation suspended, for so long a period as is often done by contingent limitations.

If grants at common law which have this operation are so justly regarded as hostile to the public interest, it must certainly be admitted that the same result is equally injurious when it is wrought by devises, by conveyances to uses, or by any other mode of limiting property known to the law.

But if executory devises must be regarded as too firmly established in the system of real property, to authorize their prohibition and a return to the ancient law as it was understood before the case of *Pells v. Brown*, an extension of the evil was to be deprecated, and certainly was not to have been expected in a republican country at this commercial period of the world.

In a code or digest of the law relating to contingent remainders, as they have long been understood, the great object would be to ascertain and fix the principles which have been already established. Few if any changes could be made or suggested, for the system is founded upon rules of great simplicity and perfect wisdom and constitutes, as it has been gradually wrought out by the sages of the law, a noble monument to their learning.

S. F. D.

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**ART. IV.—OF THE NOTICE TO BE GIVEN BY A RETIRING PARTNER ON THE DISSOLUTION OF A PARTNERSHIP.**

As every ostensible partner holds himself out as responsible for the debts and engagements of the firm, of which he is a member, the law requires that every such partner on retiring shall give notice thereof, if he wishes to exonerate

himself from responsibility for contracts afterwards made by the other partners in the name of the firm. If, however, the remaining partners enter into transactions out of the usual course of business, the retiring partner will not be bound, although no notice of his retiring has been given. Thus, where a partnership was dissolved by the absconding of one of the partners, and his copartner told the holder of a note against them not then due, that they were going to fail, and renewed the note in the name of the firm, making it payable on demand, in order that the creditor might secure himself, it was held, that this note did not bind the absconding partner, notice of the dissolution being either not necessary, or being implied by the transaction itself.<sup>1</sup> When a partnership is dissolved by death, the estate of the party dying will be exempt from liability for all new contracts made by the surviving partners, whether notice has been given or not.<sup>2</sup> Notice is not necessary where dissolution takes place by act of law, as where a partnership exists between two persons who reside in different countries, and the partnership is dissolved by the breaking out of a war between the two countries, the existence of the war dispenses with the necessity of giving public notice of the dissolution.<sup>3</sup> But where the copartners in a firm obtained an act of incorporation as a manufacturing corporation, and transferred all their partnership property to the corporation, and the corporation made a by-law, providing that the business should be carried on in the name of the partnership, it was held, that if the partnership was dissolved by these proceedings, yet that the members of it were liable as partners, upon contracts subsequently made in the name of the partnership with third persons having no notice of the dis-

<sup>1</sup> *Whitman v. Leonard*, 3 Pick. 177.

<sup>2</sup> *Vulliamy v. Noble*, 3 Meriv. 615; *Scholefield v. Eichelberger*, 7 Pet. 594; Coll. on Part. 62.

*Griswold v. Waddington*, 15 Johns. 57; 16 Johns. 438.

solution.<sup>1</sup> No notice is necessary when a dormant partner retires from a firm, because as his connexion with the firm was unknown, third persons have never trusted to his credit.<sup>2</sup> Even where a person has retired from a firm, who, though intentionally a dormant partner, was known to many as a member of the firm, he will not, by failing to give notice of his retirement, become liable to the creditors of the remaining partners, if such creditors, at the time of their respective contracts, were ignorant that he was ever a partner.<sup>3</sup> Where the partnership of a dormant partner is known to one particular creditor, he will be liable to that creditor, until he has notice of the partner's retirement.<sup>4</sup> Knowledge by such creditor may be presumed, from the fact that it was matter of public notoriety at the place where the creditor dealt, that the dormant partner was connected with the firm.<sup>5</sup>

The only notice necessary, as to all persons who have not had previous dealings with the firm, is by publication in some one of the usual advertising newspapers of the place, where the business is carried on. The notice must be a reasonable one. The reasonableness of the notice is a question partly of fact and partly of law. The jury may, if they please, find the facts specially, leaving it to the court to decide the question as to the legal sufficiency of the notice, or they may find a general verdict under instructions from the court as to what is in law a sufficient notice.<sup>6</sup> When the facts which are supposed to constitute notice are

<sup>1</sup> *Goddard v. Pratt*, 16 Pick. 412.

<sup>2</sup> *Evans v. Drummond*, 4 Esp. 89; *Brooke v. Enderby*, 6 E. C. L. R. 23.

<sup>3</sup> Coll. on Part. 313; *Carter v. Whalley*, 20 E. C. L. 333; *Armstrong v. Hussey*, 12 Serg. & R. 315.

<sup>4</sup> *Evans v. Drummond*, 4 Esp. 89; Coll. on Part. 314.

<sup>5</sup> By Parke J. in *Carter v. Whalley*, 20 E. C. L. 334.

<sup>6</sup> 3 Kent, 67; *Mowatt v. Howland*, 3 Day, 353; *Goddard v. Pratt*, 16 Pick. 432; *Martin v. Walton*, 1 McCord, 16. In *Ketcham v. Clark*, 6 Johns. 148, the court seem to think that the reasonableness of the notice may perhaps become a question of fact in some cases.

once ascertained, it is altogether a question of law, whether the notice was reasonable or not; and in such case, there is nothing to be left to the jury.<sup>1</sup>

In England, it seems to be necessary that notice should be given in a particular newspaper, the London Gazette,<sup>2</sup> but no similar rule prevails in America. It is sufficient in this country, if notice is given in some one of the usual advertising newspapers of the city or county where the business is carried on. A reasonable notice thus published is constructive notice from the date of the publication to all the world, except those who have had previous dealings with the firm.<sup>3</sup> Evidence of the mere notoriety of the dissolution is not admissible to prove notice.<sup>4</sup>

It is well settled, that those who have had previous dealings with the firm must receive actual notice, and the usual and proper mode is to send circulars to all such persons.<sup>5</sup> A creditor's knowledge of the retirement of a partner may be inferred from circumstances, for it is sufficient if he possess such knowledge, without regard to the manner in which it was acquired.<sup>6</sup> Evidence has even been admitted, that it was the usage of a firm to send circulars to their customers on any change of partners.<sup>7</sup> Where plaintiff sued A on a note signed A and B, dated 3d April, 1820, and subscribed in the handwriting of B, and it appeared that A the defendant and B had carried on business together as partners, under the firm of A and B, and that plaintiff had been one of their customers; and two witnesses proved, that in April, 1818,

<sup>1</sup> *Mowatt v. Howland*, 3 Day, 353.

<sup>2</sup> Coll. on Part. 311, and cases there cited.

<sup>3</sup> *Ketcham v. Clark*, 6 Johns. 147; *Mowatt v. Howland*, 3 Day, 353; Coll. on Part. 311.

<sup>4</sup> *Pitcher v. Barrows*, 17 Pick. 361.

<sup>5</sup> *Graham v. Hope, Peake*, 155; *Wrightson v. Pullan*, 2 E. C. L. 433; Coll. on Part. 311.

<sup>6</sup> *Hart v. Alexander*, 32 E. C. L. 715.

<sup>7</sup> *Ib.*; but see *Flack v. Green*, 3 Gill & J. 474.

A, B, and C entered into copartnership under the firm of C, B & Co., and carried on business at the same store, previously occupied by A and B, that they (the witnesses), after the last mentioned period, had no knowledge of any separate firm existing under the name of A and B, and that the plaintiff, who lived in the same neighborhood, was frequently in the store of C, B, & Co., where notice of the dissolution of the partnership of A & B was posted up, it was held to be sufficient evidence from which a jury might infer that the plaintiff had notice of the dissolution.<sup>1</sup> In one case, notice of a dissolution of a partnership published in a gazette, which was taken by a bank, was held to be sufficient notice to the bank, though it had had previous dealings with the partnership.<sup>2</sup> The rule deducible from this case, says Mr. Justice Cowen, in *Vernon v. Manhattan Co.*, 17 Wend. 527, is too general. The mere taking of the gazette is supposed to be enough, which is clearly going beyond the strongest cases. But it may be questioned, whether the latter case does not go quite as far in the opposite direction. The court there decided, that a publication of notice of dissolution, in a newspaper taken at a bank, is not sufficient notice—the bank having had previous dealings with the firm—and was not competent evidence to be submitted to the jury. In England, the rule seems to be, that such evidence is sufficient to go to the jury, who may infer or not, as they think proper, that the party taking the paper received notice. In a case, where it was proved that notice of a dissolution of partnership was inserted once in a newspaper, taken in by the party sought to be affected by the notice, and left at his house in the usual course, lord Ellenborough left it to the jury to say, whether the attention of a tradesman, in reading a newspaper, was not likely to be attracted by notices of the dissolution of partnerships, to

<sup>1</sup> *Irby v. Vining*, 2 McCord, 379.

<sup>2</sup> *Bank of S. C. v. Humphrey*, 1 McCord, 388.



which the attention of others might not be directed, and whether, under all the circumstances of the case, the plaintiffs had actually received notice of the dissolution; observing, that in such cases, the usual and most prudent course was to send circular letters to all with whom the partners had dealings.<sup>1</sup> In another case, his lordship observed, that a creditor might be expected to look into the gazette for notices of the dissolution of partnerships, but not for notices by carriers of the limitation of their responsibility.<sup>2</sup> And in a late case, it was even given in evidence against a creditor having had previous dealings with a firm, to prove notice of a dissolution, that the dissolution was published in a newspaper which was taken at a reading room, to which the creditor was a subscriber and which he frequently visited.<sup>3</sup> Whether actual or constructive notice has been given, is a question of fact for the jury,<sup>4</sup> and the weight of authority seems to be, that publication of notice of dissolution of partnership in a newspaper, which is proved to be taken by a creditor, is evidence to go to the jury, that such creditor received notice.

Although due notice of the dissolution of a partnership has been given, yet if the retiring partner suffer his name to be held out to the world in such a manner as to induce the belief that he still continues therein, he will be held liable for future contracts made by the other partners in the name of the firm; as if he allow his name to remain in the firm exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements.<sup>5</sup> The knowledge of the party that his name is so used, and his assent thereto, is the

<sup>1</sup> *Jenkins v. Blizard*, 2 E. C. L. 451.

<sup>2</sup> *Munn v. Baker*, 3 E. C. L. 339.

<sup>3</sup> *Hart v. Alexander*, 32 E. C. L. 715.

<sup>4</sup> By Shaw C. J. in *Goddard v. Pratt*, 16 Pick. 433.

<sup>5</sup> *Fox v. Clifton*, 19 E. C. L. 240.

ground upon which he is estopped from disputing his liability as a partner.<sup>1</sup>

A party has been held liable on a promissory note made in the name of the firm in which he had been a partner, though it was drawn after the dissolution of the partnership, he having suffered his name to continue in the firm, and although the plaintiff knew the facts at the time he took the note. Thus A, B, and C were partners. B retired from the firm, but it was agreed that his name should continue until a future day. A afterwards drew a note in the name of the firm, payable to B. Before this note was drawn, B informed D that he had ceased to be a partner, but that his name was to continue for a certain time. It was held, that B was liable on this note notwithstanding such communication made to D; for that D knowing that B's name was to be continued, knew that he was therefore responsible, and of course he relied on that responsibility.<sup>2</sup>

There appears to be some disagreement among the cases, as to what shall be considered such an assent of the retiring partner. In one case, A and his three sons carried on business under the firm of A and Sons. A died in 1805, and his three sons continued the business under the same firm until 1808. Two of the sons, B and C, then withdrew and established a new business under a new firm; notice of dissolution was published in the London Gazette, and was sent round to the correspondents of the house. D, the other son, continued the old business by himself under the old firm, and accepted the bill in question drawn upon A and Sons. The plaintiff had not had any dealings with the partnership of A and Sons when composed of the three brothers, and when he took the note in question did not know that the partnership had been dissolved. Lord Ellenborough held that defendants were not liable, ample notice

<sup>1</sup> *Ib.*; and see *Stables v. Eley*, 11 E. C. L. 497.

<sup>2</sup> *Brown v. Leonard*, 18 E. C. L. 270; *Coll on Part* 312.

having been given of the dissolution; and that they were not bound to apply to the lord chancellor for an injunction, to prevent the brother from using the old firm, or to take any notice of the firm which he might happen to use.<sup>1</sup>

In a subsequent case, however, the same judge decided, when after the dissolution of a partnership between A and B, and the advertisement of it in the gazette, A accepted a bill in the name of the firm bearing a date previous to the dissolution, for the accommodation of a third person who indorsed it for value, the name of the old firm continuing to remain over the shop after the dissolution of partnership and notice of it, and indorsement of the bill, that B was liable as a partner to a bona fide holder. The mere fact of B's name remaining in the old firm over the shop after dissolution was held by the court to be sufficient evidence of B's assent to his name's so remaining.<sup>2</sup> In another case, Abbott C. J. seems to take the same view and says, "if the name was continued over the door, that was certainly inducing persons to believe that he continued a partner."<sup>3</sup>

The assent of the retiring partner to the continuance of his name in the firm seems to be properly a question for the jury. The fact that his name did so remain would in connection with other circumstances be strong and perhaps conclusive evidence of his assent thereto, as where it appeared that he was aware of the continued use of his name and was in the habit of visiting the place of business of the firm and advising with them as to their operations; in other cases, as where the retiring partner lived in a distant place and could not be supposed to be informed as to the acts of the remaining partners, the mere fact that his name continued to be used by them would not be competent evidence to prove his assent.

G. W. B.

*Baltimore, Md.*

<sup>1</sup> *Newsome v. Coles*, 2 Camp. 617.

<sup>2</sup> *Williams v. Keats*, 3 E. C. L. 351.

<sup>3</sup> *Dolman v. Orchard*, 12 E. C. L. 47.

## ART. V.—INFLUENCE OF INSANITY ON CRIMINAL RESPONSIBILITY.

*De principio imputationis alienationum mentis in jure criminali recte constituendo. Disserit C. J. MITTERMAIER.*  
Heidl*b.* 1838.

IN our last number was inserted a short notice of this performance from the *Revue Etrangere et Française*, but the distinguished reputation of the author as a writer on criminal law, the great importance of the subject, and the fairness and ability with which it is treated, all concur in claiming from us a more particular account of its contents. Professor Mittermaier has come to his task, evidently well prepared by a thorough acquaintance with the labors of others, without distinction of country, and has discussed the difficult and delicate questions which this branch of medical jurisprudence presents, in that spirit of calmness and candor which should ever preside over scientific inquiries. Had he followed the example of some who have undertaken to enlighten their fellow-men on this subject, he would have deemed it unnecessary to trouble himself about the facts recorded by competent observers, and acquainting himself with the writings of others just enough to misunderstand their opinions, he would have plumed himself on his sagacity in detecting their errors, and displayed his regard for truth and courtesy, perhaps, by stigmatizing them as visionary theorists. This, however, he has not done, and not having done it, he has subjected himself to the suspicion of being as wild and visionary as any of those who have humbly endeavored to make the criminal law of insanity faithfully reflect the light of modern science and modern humanity.

It appears that professor Mittermaier published a dissertation on insanity in relation to criminal law, in 1825, and

was induced, as he informs us, again to examine this subject, in consequence of the numerous contributions that have been made to our knowledge respecting it since that time, among which, as deserving the attention of jurists and legislators, he has paid us the compliment of mentioning the various articles that have appeared in this journal within the last three or four years.

Insanity, in some form or other, is now considered among all civilized communities, to be a sufficient reason for absolving its subjects from all responsibility for criminal acts. The points in dispute are, what forms of the disease have this effect, and what legislative provisions will best protect the innocent and maintain the security of society. It is our author's present object to elucidate these points, and we shall now proceed to state the results to which his inquiries have led him.

Professor Mittermaier assumes as his starting-point, that the essential conditions of responsibility are a consciousness of having committed the offence, and a perfect freedom of the will, by means of which we possess the faculty of choosing between good and evil. It is not to be understood, that the freedom of the will is affected, merely because the same inducements produce different determinations in different men, or in the same men at different times. Defective education, or a long course of vicious indulgence, may produce an habitual proclivity to evil, and render the individual, in popular phrase, a slave to his passions, without, however, abridging his moral liberty in such a manner as to take away responsibility. To have this effect, the impairment of his freedom must have been not his own act, but have resulted from external restraint, or from the influence of disease or of other abnormal causes.

Two conditions are required, says our author, to constitute that freedom of the will which is essential to responsibility, namely, a knowledge of good and evil, and the faculty of

choosing between them. Strictly speaking, the latter condition alone, it appears to us, has any connection with moral liberty, which is impaired only when the agent is constrained, in spite of his wishes and endeavors to the contrary, to choose the evil instead of the good. To say that the actions of an insane man are involuntary, or, in other words, are performed without the exercise of any will at all, as writers on insanity have been in the habit of repeating after one another, is either to pervert language from its ordinary signification, or to state as matter of fact, what is a mere metaphysical quibble. An insane person may do—and feel perfectly free to do or not—what seems to him good; and, though he may believe that to be good which is really evil, yet so long as he can act according to the suggestions of his intellectual powers, so long his will continues free. Still, though knowledge of good and evil may not be a condition of free will, it is none the less essential to responsibility, and therefore our author's remarks upon it lose none of their practical value.

This knowledge of good and evil requires, first, that knowledge of one's self by which he recognises his personal identity, and refers his acts to himself; secondly, a knowledge of the act itself, that is, of its nature and consequences; thirdly, a knowledge of the relations of the act, both in regard to men and measures; fourthly, a knowledge that the act in question is prohibited either by the moral or the statute law. Whence it follows that whenever this knowledge is taken away or diminished by the influence of disease or other abnormal causes, responsibility is also taken away or diminished.

The power of choosing between good and evil requires the absence of all those conditions which constrain a person to follow the will of another, so that he can only choose between the criminal act and another unavoidable evil. The constraining power is either external, when one is

irresistibly forced to commit an act; or, internal, which impels a person, in the strongest possible manner, to act in a certain way. Among the conditions incompatible with criminal responsibility is to be reckoned that of insanity, when it really exercises the requisite degree of constraining force.

Insanity consists in a certain perturbation, in which the equilibrium of the human forces—the harmony of which constitutes mental sanity—is so disturbed, that the agent either has no knowledge of the act or of its relation to the moral or statute law, or has so lost the liberty of choosing between good and evil, that he is impelled to criminal acts by an irresistible internal force, even against the conviction of his reason, and in spite of his efforts to the contrary.

The question now is, in what forms of insanity is criminal responsibility destroyed, and to answer this question, we are to ascertain how far, in each particular form, the knowledge and liberty above indicated are impaired.

The knowledge requisite to responsibility may be removed, when the delinquent is deceived by false ideas respecting his own identity or that of other persons or things, and also when he is incapable of perceiving the legal relations of the act in question. Professor Mittermaier observes, very justly, that not every false notion can be considered as sufficient to annul criminal responsibility, and, as an example of such, he alludes to the case of one who imagined that he was cruelly harassed by the persecutions of a certain person whom he falsely considered to be the cause of all the misery he endured. The particulars of this case, by which we could better judge of its nature, are not given, but it seems on the face of it to be one of insane belief; and if it appeared that there was no communication between the two individuals, or that the fact of persecution was in any way impossible, then there could be little if

any doubt, that such was its nature. Indeed, our author subsequently alludes to the case of a young man who assassinated a couple of women in the theatre of Trieste, in the false belief that he had been made the miserable victim of the charms and incantations of the younger,<sup>1</sup> and approves of his acquittal on the ground of insanity, though this false notion was the most prominent and only positive sign of insanity. We strongly suspect, too, that the next example, that of a mother who kills a beloved daughter in the belief that she was in imminent danger of seduction, and that sudden death alone could save her from eternal perdition, is one of those false notions which indicate an irresponsible state of mind, for we cannot recollect any similar case—and they have been of frequent occurrence—in which the proof of insanity was not established by other tests. In order that the false notion may be deemed sufficient to annul responsibility, continues our author, it must have exerted such a power over the patient's mind, that he could not free himself from the delusion by which he was possessed. Insane people are, no doubt, deeply engaged by the crotchets that besiege their brain, but we are not sure that in this respect they greatly differ from many of their saner fellow-men. It would be no less difficult to convince the latter of the absurdity of some of their darling notions, though obvious enough to every body else, than to convince the maniac that he is not a powerful king, or about to marry a beautiful princess. The character of the predominant notion can never, indeed, by itself alone, furnish a sufficient test for judicial purposes, of the condition of the mind, because in the unequivocally insane it is not always absurd, unfounded, or false. The question of insanity is to be decided by an examination, not only of the predominant notions, but of the mental constitution when

<sup>1</sup> See 14 Am. Jurist, 263.



well, the bodily health, the circumstances attending the act, &c., and we regret that professor Mittermaier has not taken occasion to state, that this course, if faithfully and deliberately pursued, will generally clear up any doubts that may have been produced by the character of the patient's belief. He next goes on to say, that the pathological condition which gives rise to the false notions ought to be of considerable duration, to render the latter an excuse for criminal acts. But if the presence of the pathological condition be clearly proved, why require it to have existed for a year or a month, rather than a week or a day? True, it may have existed for some time without being observed, or at least, without being susceptible of legal proof, but the moment this proof is furnished, whether sooner or later, the duration of the disease is obviously an indifferent circumstance.

On the subject of lucid intervals which are next alluded to, the author's views, so far as they are expressed, coincide with those we have hitherto maintained in this journal. We cannot satisfy ourselves, however, that there are any grounds of distinction, as he intimates there are, between intermissions and lucid intervals; and by the best English and French writers, these terms are used as meaning the same thing. By intermissions we mean those periods of a disease, during which the more prominent symptoms have entirely disappeared, the pathological condition which gave rise to them still remaining in some form or other; and what but this, in reference to insanity, is the lucid interval, as described by professor Mittermaier himself. "That state only can be called a lucid interval," says he, "in which, the disease yet remaining, the patient perceives his morbid condition, and is no longer impelled by any delusion, nor blind appetite preventing the free exercise of the will."

To the inquiry whether the knowledge requisite to re-

sponsibility is to be considered as unimpaired, when the individual manifests design or contrivance in the execution of his plans, or can in any respect distinguish good from evil, our author's reply is precisely what might have been expected from one who has made himself acquainted, by personal observation, or the perusal of accredited works, with the manners, views, and conduct of the insane. He recognises cunning and contrivance among those qualities which are least frequently affected by insanity; and the power of distinguishing good from evil, abstractly considered, he declares to be unimpaired in a very large proportion of cases. He rebukes the English jurists for their rigid adherence to the antiquated doctrine, that whoever can distinguish good from evil enjoys freedom of will, and retains the faculty, if he please to use it, of conforming his actions to the requirements of law. On this point, to use his own language, "the true principle is, to look at the personal character of the individual whose responsibility is in question, to the grade of his mental powers, to the notions by which he is governed, to his views of things, and finally to the course of his whole life and the nature of the act with which he is charged. A person who commits a criminal act, may be perfectly well acquainted with the laws and their prohibitions, and yet labor under alienation of mind. He may know that homicide is punished with death, and still have no freedom of will." It was scarcely to have been expected, in an age that has witnessed an unexampled diffusion of knowledge, that a truth like this, which is testified to by the unanimous voice of those who have devoted any particular attention to insanity, and which may be considered as well established as any truth dependent on observation, should be positively denied by an English judge, and that too under the tremendous consequence of directly producing the death of a fellow-being, and

establishing a precedent that might seal the fate of numberless others.<sup>1</sup>

We are obliged to differ from professor Mittermaier respecting the degree of mental perturbation in insanity, requisite to annul criminal responsibility. Indeed, some of his remarks seem to be inconsistent with the general spirit of his dissertation, and with particular passages in which this question is touched. It is necessary, he says, "either that the use of reason should be clearly taken away, and the agent prevented from perceiving the nature and consequences of his acts; or that some figment of the imagination, or delusion, should so possess the individual and distort his perceptions, that it becomes his rule of action and shapes all his thoughts, desires and actions. A man who imagines that his brain is gnawed by serpents, or that his legs are made of glass, may, in the opinion of medical men, be deemed insane, but cannot, for the single reason alone that he is possessed by some delusion, be placed in the number of those who are freed from responsibility, on account of insanity." In reply, we would say that there is a large proportion of the unequivocally insane, whom, we are sure, our author would be the last to hold responsible for criminal acts, who are so far from being under the complete and constant dominion of their predominant notions, that on other subjects they converse rationally and pertinently, and perform mechanical operations and discharge other duties, with as much despatch and propriety, as if they had never been otherwise than sane. It seems not to be generally understood, that it is only a *class* of insane patients who are continually brooding over their

<sup>1</sup> We allude to the charge of justice Park in the trial of Greensmith at the summer assizes for the county of Nottingham, 1837. We shall embrace an early opportunity to give some account of this case, so strongly characteristic of the state of knowledge and feeling among English jurists, on the subject of insanity.

troubles and revolving their peculiar ideas, while there are other classes no less insane, in every rightful signification of the term, who are able to withdraw from their diseased fancies, and to talk, act, and appear like rational men. "When the delusion occupies the whole mind and governs all the perception and actions," to quote from a subsequent page, responsibility is annulled, "because then, the understanding which teaches that a meditated act is bad cannot exert its force." If the fact presumed in this reason—that the understanding fails to recognise the true notice of actions—be established, it certainly must be immaterial how far the delusion extends. In the very case mentioned, that of a man who imagines his legs are made of glass, our author is led by another rule in a subsequent part of his tract, to conclude that he could not be held responsible for wounding another, who should approach him with a cane for the purpose of breaking his legs, because he acts upon the law of self-defence. Here it must be admitted, that the understanding cannot exert its force, in this particular case, and yet the person's mind is so far from being entirely occupied with the delusion, and all his thoughts and perceptions governed by it, that he may, in spite of his glass legs, be a worthy and efficient member of society. If the delusion is produced by insanity, by a pathological condition—and he admits that it may be—and more especially if the criminal act be its direct offspring, then the individual would be irresponsible under the legislative provision which the author advocates in the latter part of the dissertation, namely, that responsibility shall be considered as annulled by the presence of insanity.

Melancholy can affect responsibility only when so severe as "to pervade the whole nature of the wretched man, deprive him, in a measure, of the consciousness of his actions, and pervert the ordinary rule of life." The term *melancholy* is here used probably in the popular and not the

medical signification, meaning a state of sadness and mental depression, which may or may not be a symptom of disease, and thus used, the remark here quoted is, no doubt, generally correct. In practice, however, the question never would be, whether the melancholy were slight or otherwise, but whether or not it were a symptom of insanity.

On the subject of homicide connected with suicide, we are not aware that professor Mittermaier differs from the principles of the English common law, except perhaps, in the case, where two persons desirous of dying agree in good faith to kill each other. He thinks that the survivor, if there happen to be one, is not a fit object of punishment; but whether, because he considers his responsibility annulled, or that the act is not criminal, we are not told.

Wrong views and opinions which lead men to crime are not sufficient to annul responsibility, unless they exert such an influence on the mind, that it is not aware that the criminal act is contrary to the laws, either believing it to be permitted by the laws, or confounding and distorting its legal relations. Religious or political fanaticism, we may add by way of illustration, may lead a man to believe that the murder of an obnoxious individual would be good service to God or the country, without his forgetting, for a moment, that it would be an unlawful and a penal act; while insanity giving rise to the same notion would also deprive the intellect of the power of discerning its true relations to the law.

Neither does the existence of hallucinations necessarily annul responsibility, because they may not be the offspring of disease, or only of that incipient stage of it when the mind has not lost the faculty of distinguishing the true from the false, and of regulating the conduct in conformity to the law. They often occur in bad men whose sensibilities are quickened by the upbraidings of conscience, or the agony of remorse; and so vivid may be these false perceptions

under such circumstances, that the reflective powers may believe them to be real and true without losing their accustomed sanity. Hallucinations, therefore, are to be considered as indicative of a disturbed, not necessarily of an insane mind.

The course of our author's inquiry next leads him to consider the effect of insanity on free-will, or the faculty of choosing between good and evil. He admits a form of mental derangement, called by the French writers, *folie raisonnée*, and by the English, moral insanity, in which, without any perceptible derangement of the intellect, and without any thought of personal advantage, the patient is urged by a blind, irresistible impulse to certain acts of violence or destruction. The objections usually brought against the reality of this form of insanity and its competence as an excuse for crime, are satisfactorily removed, but as the discussion presents no points that have not been more fully treated in works easily accessible to the reader, we have thought it hardly worth our while to dwell upon them here. We are utterly unable to account for the prevalent reluctance to admit this species of insanity, and it certainly will excite the wonder of the next generation, that doctors and lawyers should have warmly disputed about the existence of a disease, which, for years, had been a matter of daily observation in every lunatic retreat and hospital in the land. Where this affection is alleged in excuse for crime, it must be proved, first, that it was really present; secondly, that it had arrived to that stage in which its impulses are irresistible; thirdly, that it should be the exclusive cause of the criminal act.

The opinion of one of his countrymen, Diez, that mental alienation is always to be presumed, when a crime is committed without any hope or thought of advantage, receives no favor from our author, though he admits that under such circumstances, the greatest prudence is required on the part of the judge, lest he be unintentionally guilty of much in-

justice. Georget has laid down a similar, though broader principle, which he would probably find less objectionable, "that an act committed without interest, without passion, and opposed to the natural character of the individual, is evidently an act of madness."

Professor Mittermaier very properly rejects the principle put forth by some writers on this subject, that responsibility should be considered as annulled, when any disease is present which might have produced mental derangement, or exerted a certain power over the mind. He thinks the criminal act should be clearly proved to have been the offspring of disease accompanied with unequivocal insanity. In regard to epilepsy, which is one of the diseases referred to in this connexion, his remark is worth remembering, that not only is the mind so disturbed during the paroxysm as to be deprived of all consciousness, but is greatly enfeebled by the long continuance of the disease, and finally reduced to a state of mania, or fatuity.

The accession of the state of puberty sometimes give rise, among other phenomena, to considerable mental disturbance, under the influence of which the youth may be guilty of unlawful, and even criminal conduct. A large proportion of the cases of motiveless incendiarism, *monomanie incendiaire*, as it is called by Esquirol, which have been observed in Germany, were in girls from nine to fifteen years of age; and are attributed by Henke, who has devoted some attention to this subject, to the arrest or disturbance of the evolution of the organs which takes place at the time of puberty. It appears however from the researches of Marc, that in France, this kind of incendiarism is far oftener committed by males than females—by adults than youth, so that we are not to look for its cause exclusively in the changes incident to puberty. Our author considers it necessary that there should be positive and satisfactory proof of mental disturbance, independent of the mere circumstance of the accused being at the age of puberty.

Pregnancy is sometimes accompanied by abnormal conditions of the mind, under the influence of which, the individual cannot be justly considered as responsible for criminal acts. Of course, in every case, some proof is required that pregnancy is thus accompanied, beyond the mere allegation of the accused, and this, our author looks for in the character of the act itself, or in the general mental and bodily health. If the act were, to all appearance, motiveless, or the mind were evidently laboring under excessive melancholy, or other strong symptoms of mental alienation, the presumption is in favor of the accused.

Professor Mittermaier devotes a couple of pages to monomania, by which he means an insane impulse to a specific crime, such as murder, theft, incendiarism, without seeming to be aware that this form of insanity is universally considered—at least by French and English writers—as the same thing which Pinel first described under the term *manie sans delire*, and which he has already discussed. Of course, his remarks relative to the effect of the one, on responsibility, are equally applicable to the other.

Having thus examined the various disorders of the mind capable of impairing legal responsibility, professor Mittermaier next indicates and briefly comments upon several forms of legislation which have been adopted in reference to this subject. We trust that the necessity of correct and philosophical legislation on this point is beginning to be felt, and certainly the time has come when the condition of medical and legal science warrants us to expect, that the criminal law relative to insanity will soon be as distinctly and definitely settled as the nature of the subject will possibly admit. It is time that this relation were fixed by something more stable, more accurate—something more like law—than the vague and conflicting speculations of courts and juries which determine it now wherever the English common law is in force. We have strong reason to believe that within a



few years, persons have been convicted and executed, in England—and for aught we know, the remark is applicable to this country, though probably in a less degree, whom any medical man at all competent to give an opinion, would have pronounced unequivocally insane. And this event has happened merely because the judge, who may not have given an hour's attention to the subject of insanity in the whole course of his life, has entertained some peculiar notions respecting its effects on the will or the intellect. May we not reasonably require that our law-makers, who never deem it beneath their official dignity to exhaust the resources of legislation for the protection of alewives, or oyster-beds, should devise some measures for effectually preventing the wretched victim of insanity from suffering the fate of the hardened felon. The Germans have differently estimated the value of human life and reputation, and, unshackled by that veneration for the wisdom of their ancestors which hallows even their errors, they have freely resorted to the light of the present, as well as of past times, in their endeavor to perfect the criminal law of insanity. True, different states have adopted different legislative provisions, some more and some less calculated to obtain their object, but the very circumstance of this diversity of results is indicative of a spirit of inquiry and desire of improvement, which will sooner or later remove their imperfections. It will not be thought unprofitable, we trust, to exhibit the course which legislation on this subject has taken in Germany, and this we are abundantly enabled to do, by the examples which professor Mittermaier has adduced.

First, "the legislator, without laying down any principle by which insanity is to be judicially established, may mention various diseases in the code, as those alone which the judge may consider as freeing from responsibility."

The Bavarian code (1813) follows this course, as well

as the code of Basle, promulgated in 1835. In article 2 of the latter, we find the following words:—"Minors, and those laboring under general mania, or hallucination, cannot be punished as criminals, nor, generally speaking, can any others be thus punished, who have committed a crime while deprived of the use of their minds (*Geistesabwesenheit*.)" The same exemption from punishment is made in the code of Turin, (1835) art. 63: "Persons laboring under general mania, or hallucination, as well as all others who were deprived of the use of their understanding at the time when the illegal act was determined on and executed, cannot be punished for penal offences." In the proposed Hanoverian code, we find the following articles:—"An unlawful act which was not committed with wrong intentions, nor in consequence of carelessness, is exempt from punishment." Art. 82. "They therefore are exempt from all punishment for crime, who labor under general mania, general, or partial hallucination, or generally speaking, any mental or moral disorder by which the use of reason is taken away." Art. 83.

Professor Mittermaier very justly objects to this method, that the diversity of opinion among medical men, respecting the names and exact nature of mental disorders, must be a source of endless uncertainty and embarrassment both to the legislator and the judge. How can the former be sure that the names which he uses will signify the same disorder to others, that they do to him? And how is the latter to ascertain that the case before him can be referred to this or that disorder specified in the law? The only resource they have, is to be guided by the opinion of some particular physician, or college of physicians,—an imperfect method of obtaining the principles of eternal truth. It is to be considered, too, that the progress of science may make us acquainted with new forms of disease, or improve the nomenclature of those we already know; and hence it may happen that the judge will be obliged to condemn the accused, though

satisfied by the results of new and enlarged experience, that he is laboring under a form of mental disorder, which renders him irresponsible for his acts; but is not mentioned in the law which he is bound to follow. Besides, there are various stages in every mental disorder when the patient may be really irresponsible, but the features of which are not strongly enough defined, to warrant the physician in referring it to any particular one of the forms mentioned in the law.<sup>1</sup>

Secondly, a general principle may be laid down, by which the judge is to decide, whether or not, the accused is responsible for criminal acts.

This course has been taken by the framers of the proposed Saxon code which contains the following article :—"Responsibility is annulled in persons who are deprived of the use of reason, by mental disease." Art. 65.

Our author observes, that considering the infinite diversity of opinion respecting the exact meaning of such general terms, the legislator will be likely to fall short of his purpose, by making them too broad or too narrow in their import. It is very possible, that in any particular trial, no two persons could be found to agree respecting the practical application of such terms as, *deprived of the use of reason*, *bereft of understanding*, &c., and how many judges would see, in the unfortunate monomaniac before them,—who, though stained with the blood of a fellow-man, whom some wild delusion had prompted him to kill, is still correct and coherent in his discourse, staid and dignified in his demeanor, ready and shrewd in his replies,—a being deprived of his understanding, or the use of his reason? We have seen too often the deplorable failure of such general terms to protect the miserable subjects of disease, under the operation of the English common law, to doubt for an instant of the entire correctness of our author's remark.

<sup>1</sup> See a remarkable case of this kind, that of Pechot, in our last number.

Thirdly, particular diseases may be mentioned, as examples of those which annul responsibility.

In the Norwegian code proposed in 1835, we find the following article :—"They are exempt from punishment for their acts, who are affected with general mania or hallucination, and also they who are deprived of the use of their understanding by sickness."

The same objections that were urged against the first form of legislation are equally applicable, says our author, against this. Indeed, the illustration here given from the Norwegian code, it appears to us, would have been as properly arranged under the first.

Fourthly, we may lay down a general principle for determining the state of mind in which responsibility is annulled, and adduce certain diseases as illustrations of the principle.

In the proposed Wurtemberg code, article 91 contains these words :—"An illegal act is exempt from punishment, if committed in a state of mind in which the use of reason is taken away; to this state belong, chiefly, general mania, general and partial hallucination, entire imbecility, and complete confusion of the senses, or understanding." In the code of the grand duchy of Hesse, proposed in 1836, the 29th art. reads thus :—"By reason of their impaired responsibility, punishment cannot be inflicted on those who commit penal acts in a state of sleep, of somnambulism, of general mania, of hallucination, of imbecility, or of any other mental disorder, which either takes away all consciousness respecting the act generally and its relation to penal law, or, in conjunction with some peculiar bodily condition, irresistibly impels him, while completely unconscious, to violent acts." The code of the grand duchy of Baden, proposed in 1837, has the following provisions :—"Responsibility is annulled in that condition, in which, either a consciousness of the criminality of the offence, or the free

will of the offender, is taken away." Art. 65. "To the condition which annuls responsibility on the strength of the 65th article, belong chiefly imbecility, hallucination, general mania, distraction and complete confusion of the senses, or understanding." Art. 69. In the code of Lucerne in Switzerland, article 61st reads thus :—"They who have committed an act, in a condition in which they did not possess the use of their reason, are irresponsible for that act, such as those who labor under general mania, general or partial hallucination, or any mental disorder, by which the use of reason is taken away." In the code of 1836, we find the following provisions :—"They only are responsible for their acts who perceive their illegality, and are capable of refraining from them." Art. 76. "The application of penal law is debarred, therefore, in respect to those, who, when they committed the act, were deprived of the use of their reason, by general mania, hallucination, imbecility, or otherwise." Art. 77.

This method, our author considers preferable to the others we have mentioned, inasmuch as it better conveys the real intention of the legislator, and better indicates the meaning of his terms.

Fifthly, the legislator may lay down the principle by which responsibility is to be judicially determined, and mention, by some general designation, alienation of mind, as among the causes that remove responsibility.

In Livingston's code (New Orleans, 1824, chap. 111, p. 15,) we have the following words :—"No act done by a person in a state of insanity can be punished as an offence." The revised statutes of the state of New York, (Albany, 1836, vol. ii, p. 582,) contain the same words. The French penal code is equally simple :—"There can be no crime, nor offence, if the accused were in a state of madness at the time of the act." Art. 64.

We cordially agree with our author in considering this

provision as not only having the merit of simplicity, but also as best calculated to promote the ends of justice. True, it cannot be denied, that an insane person may be actually guilty of a criminal act, his insanity being very partial, and the act not within the range of its operation, while by the letter of the law, he must be acquitted. The only way of avoiding this evil, would be to add something like the following ;—provided, *it cannot be proved that the act was not the offspring of the insanity.* We are not certain, however, that even this provision might not be the means of defeating the intention of the legislator.

The concluding observations of professor Mittermaier breathe the spirit of the humble, truth-seeking philosopher, and should sink deep into the minds of all whose duty it is to make or administer the criminal law of insanity. “In fixing upon the principle of responsibility, the legislator should avail himself of whatever light the progress of science may have furnished. With jurisprudence alone for his guide, he will never arrive at the truth. It is his duty to give his attention to the researches of philosophers and physicians, to examine them impartially, and select whatever in them is good. In laying down the principle, he should avoid indefinite and ambiguous terms, but in clear, well selected language express the certain indications by which his condition may be recognised, whose responsibility is in question. Neither is the judge, whose duty it is to administer the law, to be satisfied with merely knowing what are its provisions. He should go back to the fountain from which the legislator himself has drawn,—to the precepts of philosophy and medicine, without which and destitute of the aid that true science alone can furnish, he will be unable, in numberless cases, to arrive at the real meaning of the legislator.”

I. R.

ART VI.—ON EXTRADITION, OR THE DELIVERY OF FUGITIVES FROM FOREIGN STATES, CHARGED WITH CRIMES COMMITTED THEREIN.

[Two cases have recently occurred in this country, in which it has become important to investigate the subject of extradition; the case of Dr. Holmes, claimed by the authorities of Lower Canada of the governor of Vermont, and the case of the negroes captured in the Spanish schooner *Amistad*, claimed of the government of the United States, as offenders against the laws of Spain.

The governor of Vermont, in pursuance of a request from the governor of Lower Canada, made an order for the surrender of Holmes, the execution of which was suspended by a *habeas corpus*, issued by one of the judges of the supreme court of the state. The case was argued on behalf of Holmes before the whole court, on the 20th July last, by Mr. Van Ness, formerly governor of Vermont, in a very able and conclusive manner. This argument is republished below, as a valuable and interesting document. In connection with Mr. Van Ness's argument, we republish a letter addressed by L. S. Cushing, one of the commissioners for codifying the criminal law of Massachusetts, and also one of the editors of this journal, to Ellis Gray Loring, Esq., of Boston, on the same subject.]

MR. VAN NESS'S ARGUMENT.

THE court have already seen that our motion for the discharge of the prisoner rests upon the following grounds:

1. There is no obligation by the laws of nations to surrender persons charged with the commission of crimes in foreign countries, but it is a mere matter of comity between the different governments, and it is discretionary with each how to act upon the subject.

2. Whether there exists an obligation or a comity, a state cannot act upon the matter, but it appertains exclusively to the government of the union.

3. Admitting that the state has a concurrent jurisdiction over the subject with the national government, yet the governor cannot order a surrender without an act of the legislature giving him the power.

4. The practice of surrendering, whether by obligation

or comity, should be mutual, but it cannot be so here, since the governor of Canada does not possess the power to surrender a British subject; consequently no American citizen should be surrendered on our part.

The writers on the law relating to the subject do not agree with respect to there being an *obligation* to surrender persons charged with crimes in one country and escaping into another. Grotius, Burlemaqui, and Vattel, appear to be on the affirmative side of the question, while Puffendorf, Martens, and Coke, are on the other side.

Those who are in favor of the principle of surrender are quite vague as to the nature of the cases in which surrenders are to be made; and it is admitted that the modern practice has varied, and been confined only to great crimes. The obligation, moreover, is stated to be in the alternative; that is, that the criminal shall be given up to the power demanding him, or be punished by the government where he is found.

There is no English authority that maintains the doctrine contended for. In two of the cases cited the persons accused were sent to Ireland for trial, and in another to Calcutta, and in all three of them it was upon the ground that this was allowable by the provisions of the *habeas corpus* act of Charles the second, since the places to which the prisoners were sent were under the dominion of the king of England. What was done with the man who was suspected of a murder in Portugal is left in doubt, the whole report of the case being as follows:—"on a *habeas corpus* it appeared that the defendant was committed to Newgate, on suspicion of murder in Portugal which (by Mr. Attorney) being a fact out of the king's dominions is not triable by commission upon 35 of Henry 8, c. 3, s. 1, but by a constable and marshal; and the court refused to bail him."

The remark of judge Heath in the case of Meer against Kay, although foreign to the question before the court, so



far from operating against us, clearly shows that he did not consider the surrender of criminals as a matter of *obligation*. He expressly put it upon the ground of the "comity of nations," that it had been held that the crew of a Dutch ship, which had run away with the vessel, *might* be sent back.

Let us turn to the American authorities. Chancellor Kent, in the case of Washburn, reported in the fourth volume of Johnson's chancery reports, holds that it is the law and usage of nations to deliver up offenders charged with crimes, and escaping into a foreign friendly jurisdiction. In his commentaries he adopts the same doctrine.

No person can entertain a higher respect for the talents and learning of chancellor Kent than I do, but I beg leave to insist upon it that in this instance he has gone too far. He will even have it that the twenty-seventh article in Jay's treaty, providing for the mutual surrender of fugitives accused of murder or forgery, merely operated as a restriction of the existing obligation, with respect to the nature of the crimes, and that after the expiration of the treaty the previous obligation was revived in its full extent, and thus applicable to other crimes as well as murder and forgery.

But chief justice Tilghman, in the case of Deacon, reported in the second volume of Wheeler's criminal cases, dissents entirely from the opinion of chancellor Kent; and it appears to me that no impartial man can read this case without becoming convinced that no surrenders of fugitives ought to be made by our government to any foreign power, simply upon the general provisions of the laws of nations.

Judge Story, in his "Conflict of Laws," evidently means to have it understood that he views the matter to rest entirely on *comity*, and not that there exists any *right* to demand a fugitive, or any *obligation* to surrender him.

But the decisions and practice of our own government

are conclusive upon this point, and should have a binding force upon all our magistrates and tribunals. It has been held from the first organization of our government until the present time, that no obligation existed to surrender fugitives from other countries. Mr. Jefferson, while secretary of state under president Washington, answered an application of Mr. Genet, the French minister, in the following terms :—

“The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender coming within their pale is received by them as an innocent man, and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye is sensibly felt here, as in other countries ; but until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be to become their accomplices. The former is viewed, therefore, as the lesser evil. When the consular convention with France was held under consideration, this subject was attended to ; but we could agree to go no farther than is done in the ninth article of that instrument, where we agree mutually to deliver up captains, officers, marines, sailors, and all other persons being part of the crews of vessels, &c. Unless, therefore, the persons before named be part of the crew of some vessel of the French nation, no person in this country is authorized to deliver them up ; but on the contrary, they are under the protection of the laws.”

Mr. Munroe, as secretary of state under president Madison, in his instructions to our commissioners at Ghent, said—“offenders, even conspirators, cannot be pursued by one power into the territory of another ; nor are they delivered up by the latter, except in compliance with treaties, or by favor.” And as our government has in all cases, where applications have been made by foreign governments, refused to surrender upon the same ground, I would ask, whether these decisions, and this practice, are not conclusive upon all the authorities of our national and state go-

vernments? Are we still to look among the general and vague remarks of the writers upon the laws of nations to ascertain what are our obligations in this respect, when they have been so fully settled by our own government? This would indeed be most extraordinary.

And may it not with propriety be said, that, as a general principle, the non-surrender of fugitives from other countries would be altogether the most consonant with reason and humanity. When a foreigner enters upon our territory, although he may have been guilty of a crime before his arrival, let him be viewed by our laws as an innocent man, and fully entitled to their protection. If he conducts himself properly and uprightly he may be looked upon as a reformed man, and the object of punishment is in a measure accomplished. But if he should continue his evil course by the commission of new crimes, these same laws will then put an end to his career, and public justice will be satisfied. That such has actually been the course more generally pursued by the respective civilized and christian nations, is evident from the few cases of surrenders which have taken place, among the many thousands where offenders have sought refuge in foreign countries.

But it is for our national government to determine upon the proper course, and to regulate the matter with foreign powers. If the principle of surrender should be adopted, there is no way in which two nations can so well come to a clear and mutual understanding as by treaty stipulations. In this way each party will always understand precisely not only its own duties, but also the obligations of the other. In Jay's treaty it was deemed proper to insert a stipulation for the mutual surrender, between the United States and England, of all persons charged with murder and forgery. Since the expiration of that treaty, the agreement has never been renewed.

Secondly, from the nature and organization of our na-

tional government the power belongs to that, as incident to to our foreign intercourse. And it must of necessity be an exclusive power.

In contending for this principle, there is no necessity for depreciating the character and authority of the individual states. The constitution of the United States has made a just and reasonable distribution of power between the national and state governments, and whoever undertakes to wrest from either any of the powers thus conferred, certainly renders no benefit to the other. The cry of *state rights*, when made with a view of disturbing the national government in the exercise of an authority, or of claiming such authority, on the part of the states, in cases in which it can be exercised by the former alone, in a manner advantageous and effective for the states themselves, should not, for a moment, be listened to.

I profess to be as firm a supporter of the constitutional and sovereign rights of the states as any other man, but I do not consider it necessary, in order to prove the sincerity of my professions on this score, that I should attempt to nullify or impair any one of the necessary and unquestionable powers of the national government. The doctrine, moreover, sits natural upon me; I have always contended for it.

Let me here remark that the power of acting upon the subject is not denied to the national government by the counsel on the other side. But the question, as it relates to this part of the case, is, whether that power is exclusive, or whether the states have also a right to exercise it.

There are three ways in which the states are deprived of power by the constitution. First, where there is a grant to the national government exclusive in its terms. Secondly, where after a grant to that government, there is a prohibition upon the states in relation to the same subject. And, thirdly, where the exercise by the states of an au-

thority conferred upon the national government, would be repugnant and incompatible.

It is not necessary to inquire whether the power to act upon the subject of surrendering fugitives from foreign countries is included in any grant of the character described under the first of these heads; nor whether in any prohibition referred to under the second; but it will be sufficient to show that it becomes exclusive in the national government upon the principle stated under the last head.

The national government alone understands the state of our relations with each foreign government, and, therefore, can alone know how to act upon a matter of this kind towards each one of them. An attempt on the part of the states to interfere in cases of this sort might not only disconcert the action and intentions of the national government, but might actually prevent a general arrangement with some power that would be beneficial to the whole country.

The authorities which are most relied upon by the other side go so far as to say that a refusal to surrender a fugitive may be cause of war. But has a state the power in this way to involve the whole nation in a war? Or let us suppose that this state should demand a criminal from the governor of Canada, and the latter refuse a compliance, would the state in that case have the right to declare war? On whose behalf would it make such declaration? On its own, or on that of the national government?

The moment we admit that a state can act upon a matter of this kind we are unavoidably led into these difficulties. For with the duty or obligation to surrender, is coupled the power to demand, and to this power follows the right to enforce such demand. What reasonable man, then can, for an instant, yield his assent to a proposition so absurd and so dangerous?

From what I have already said, it appears to me there can be no foundation for the argument, that the states may

severally act upon the subject until the national government shall have acted, or until the two powers come in competition with each other. If this were to be the rule, then the United States, by entering into regulations with some foreign nations, would deprive the states of their powers with regard to such nations, while they would remain as to other countries, and might be exercised upon entirely distinct principles from those adopted by such regulations. Some states, too, might decide one way, and some another way, so that we might have, between the national and the state governments, several different and contradictory practices in relation to the same matter. And while the subject should remain as at present, without regulation by the national government with any foreign power, there would be still greater room for the action of the states to produce confusion and mischief.

We have been told in the outset, by the counsel on the other side, that this case was important from "the bearing it might have upon the character of the nation, and the continuance of our friendly relations," and also that "the proceeding was national in its character, and rested on the rules and principles of international law."

Here, as it strikes me, the case is entirely given up. Does it lay with a single state to perform acts which may decide "the character of the nation," and even "the continuance of our friendly relations?" Again, what has a state to do with a "proceeding that is national in its character," and that "rests on the rules and principles of international law." Surely we can desire no greater admissions than these.

It is contended that the law of nations forms part of the common law of England, and that as we have by statute adopted the common law, the law of nations "stands admitted in the first chapter of our statute as a part of the necessary law of the state of Vermont." Chancellor Kent,

in the case of Washburn, also seems to consider the law of nations as part of the common law.

If we were to admit that the law of nations was thus adopted, it could not alter the relative powers of our national and state governments, as fixed and regulated by the constitution of the United States. Still less could it have the effect to transform one of our states into a nation. The United States, as a whole, constitute the nation, and are alone recognised in that character. An individual state cannot be regularly known or addressed, as such, by a foreign government; nor, on the other hand, has a state the right to hold any intercourse or correspondence whatever with such government.

But let us see what our statute in this respect actually is. By the preamble we learn that the object was to furnish "a guide and direction to the several courts of justice within this state, for producing uniformity of decisions in the same." And in the body of the act it is declared, "that so much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to the constitution, or to any act of the legislature, of this state, be, and hereby is, adopted law, and all courts are to take notice thereof, and govern themselves accordingly."

Now, it is evident that the intention of this act was to aid the courts with principles for the decision of the causes that might come within their jurisdiction, as fixed and regulated by the legislature of this state, and not in any degree, to lessen the personal security of the people, or enhance the power of their rulers. There are two other sections to the act which I shall notice directly.

With respect to the law of nations forming part of the common law, all that there is of it is this: The courts in England have held that the law of nations had force, as such, in England, and that they might take notice of it in their decisions, in cases where it applied, the same as

of the common law. For instance, where a foreign ambassador, or any one of his household, was sued, they were bound to take notice of his privilege by the law of nations. And who can doubt that this is precisely so in this country? But to suppose that the law of nations and the common law of England are not distinct codes, and formed for distinct purposes, is wholly a mistake. The one operates between different nations, and is compulsory upon them; while the other is merely for internal purposes, and can only have force in countries by which it is voluntarily adopted.

Suppose that our statute of adoption had never been passed, would not the law of nations have had precisely the same force and effect in this state that it now has? And, consequently, would not the repeal of the statute leave it precisely as it now stands? Or, to place the question in a still stronger light, let me ask whether, in case the common law of England had never existed, we should not have had the same law of nations which we now have, and with the same binding force among us? There is, therefore, no foundation for the suggestion that the law of nations was brought here through the common law of England.

I will only add with respect to this point, that the counsel opposed to us himself appears to have contradicted, or at least abandoned, the position assumed by him in the first instance. He declared, in a subsequent part of his argument, that "there was a necessity for a statute recognition of the common law, inasmuch as it had its origin with one nation, but that the public national law rested on a higher foundation, being the law of the civilized world;" and that, therefore, there was no necessity for a statute enactment of it.

It is said that if the power was vested only in the national government, it would exclude the action of the governor of Canada, and thus render it necessary to demand fugitives



in Canada from the government of London. Well, what of that? Surely the relative powers and duties of our national and state governments are not to be changed, or differently construed, because Canada happens to join upon Vermont. But it does not follow, that because the governor of this state cannot demand or surrender, the governor of Canada is equally destitute of power. The latter represents the king, and possesses his executive prerogatives for many purposes in the administration of the colonial government; and such is necessarily the case in all the king's distant colonies. This was so declared by judge Reid in the case of Fisher.

But the states are expressly prohibited by the constitution from entering into any treaty, alliance, or confederation, and also, without the consent of congress, from entering into "any agreement or compact with another state, or with a foreign power." The subject of demanding and surrendering fugitives from justice, as between different countries, if acted upon at all, is one, as already stated, that is peculiarly proper for regulation by treaty, and, indeed, that can not very well be regulated in any other way. Now can it with any reason be said, that a state can act upon this subject, and that at the instance of a foreign government, when at the same time it is prohibited from entering into any agreement or compact with such government, in relation to the same, or to any other matter? Certainly the power to act implies the power to regulate the manner of action. If one party has a duty or obligation to perform towards another, the two ought to have a right to enter into some agreement or understanding, as to the way or manner of performing such duty or obligation. Is not this point so plain that it cannot be misunderstood by a person of the most ordinary capacity?

During our last war with England, this state undertook, by a law of the legislature, to prohibit people from going to

and coming from Canada, or, at least, to regulate the manner in which they *might* go and come; but the act was decided to be unconstitutional, although it did not come in competition with any existing law of congress. The decision was made upon the ground, that the states had no right to act upon, or to interfere with, any subject that was connected with the foreign intercourse of the country.

It is true that there exists a law in the state of New York authorizing the governor to surrender criminals from foreign countries, but it is believed to be the only act of the kind in the union; and it is highly probable that it will be repealed at the next session of the legislature of that state. The validity of the act has been called in question, and the governor of the state has, as we have shown to the court, just decided a case upon principles which are wholly at variance with it. The opinion of governor Seward is directly in point in this case, and we conceive it to be difficult to resist the reasons assigned for his determination.

In the case of the Bambers, the late governor, Mr. Marcy, made an order for their surrender, but that appears to have been before the constitutionality of the law referred to, and under which his predecessors had acted, was disputed. The prisoners in that case were brought by a *habeas corpus* before the recorder of the city of New York, and it is stated that the United States district attorney, by order of the president, there protested against the exercise by the state of the authority in question.

Independently of this law of the state of New York, and which, I think, may be considered as at an end, there is not a single authority in favor of the exercise of this power by the states. Chancellor Kent, who is the strongest advocate in favor of the power generally, does not undertake to decide whether it is to be exercised by the national government, or by the states. On the other hand, in the case of Washburn, he reserves this question in the follow-

ing terms: "Who are the *proper authorities* in this case, whether it be the executive of the state, or, as the rule is international, the executive authority of the United States, *the only regular organ of communication with foreign powers*, it is not now the occasion to discuss."

I come to another argument upon which it may be proper to make a remark or two. After its having been admitted, and even contended, that "the proceeding was national in its character," and that it "rested on the rules and principles of international law," the power of surrender is claimed for the state in the following terms, upon the ground that she possesses the right of internal protection. "In the grand division of powers between the two governments, our foreign relations are vested in the general government, while the whole internal security and protection is vested in the state. If it should be admitted, that the right of surrendering was incident to our foreign relations, it is not exclusively so, for it is equally a power incident to the power of internal protection and security, and as such can only be exercised by the states."

Now it appears to me, that this proposition, on the face of it is wholly inadmissible. It is agreed by all, that our foreign relations are vested, and *exclusively* vested, in the national government, and if the surrendering of fugitives is admitted to be incident to the foreign relations, then the question is at an end. If the subject belongs at all to the foreign department, it can not be divided up. No line in such case can be drawn. If a state once begins to hold intercourse with, or listen to applications from, a foreign government, there is no knowing where to stop.

But the case under consideration has no connexion with the power of a state over its internal concerns. It is true that we punish the commission of crimes within the state for the purposes of protection and security; and it is equally true that the power of punishment is precisely coextensive

with the duty of protection. Neither extends beyond the limits of the state. The prisoner is charged with no offence within the state, but is arrested in order to be delivered to the officers of a foreign country, with a view to his being there punished. A foreign government is alone interested in the matter, and it is at the instance and request of such government that the arrest has taken place.

The case decided by the supreme court of the United States, of the city of New York against *Miln*, has been referred to, but it has no bearing upon the present question. There the law of the state was held, by a majority of the court, to be constitutional, but the operation of the act was complete within the state. It authorized no restraint or arrest from which punishment abroad might follow; nor was any principle advanced by the court at variance with what we are now contending for. The question as to whether a state may forbid the entrance of its territory to foreigners does not apply, since the prisoner in this case is an American citizen; and if he were not so, it would be sufficient to answer that there is a wide difference between refusing a man permission to come, or remain, within the state, and arresting and delivering him over to a foreign hangman.

But let me ask, why was the national government first applied to in this very case, if the power to surrender was so clearly vested in the state as is now pretended? Why was not the governor of this state requested in the first instance to make the order of which we are complaining? It certainly appears to have been thought at that time that the president was the proper authority to act in the case.

This brings me to the letter of Mr. Forsyth, the secretary of state of the United States, in answer to the application thus made. It is contended that this letter refers the case to the state for its action thereupon: and it is true that there is a passage in the letter which at first view appears to have

a bearing that way. It cannot, however, have been so intended. The course taken in the case of the Bambers must be deemed to be conclusive as to the views of the present executive, could there without that be a doubt in regard to them.

Third. We contend that admitting the existence of an obligation to surrender, and the state to have a concurrent jurisdiction over the subject with the national government, yet that the governor cannot order a surrender without an act of the legislature giving him the power.

The enjoyment by the citizen of personal liberty and security, is the privilege which of all others the fathers of this state have endeavored to guard with the greatest care. By the constitution of the state it is declared, that "no person can be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." The terms used in the constitution of the United States for the same purpose are, "without due process of law."

We are now called upon to discuss the question, whether the declarations thus made use of are mere empty words, and a deception, or whether they do actually constitute a protection to the citizen. It is singular, very singular, that this discussion should at this day have become necessary, but it is nevertheless true that such necessity has actually arisen. A man, a citizen of the United States, has been for some time held as a prisoner, by virtue of a warrant or order issued by the governor of this state, and which directs that he shall be delivered over to the authorities of Lower Canada, with a view to his being tried by them, for a crime charged to have been there committed.

Here let me remark, once for all, that whatever I may say in the course of this argument, it will not be with a view of casting any imputation upon the governor of the state. On the other hand it will be my endeavor to treat him with the utmost respect and delicacy. My object will be, as it is

my duty to my client, to prove that he has committed an illegal act, but not to call in question the motives which influenced his conduct.

The design of the constitution was to define the rights of the people of this state on the one hand, and the powers of their rulers on the other; and to do it in a manner that should be plain and intelligible. What then are we to understand by the clause which provides that "no person can be justly deprived of his liberty except by the laws of the land, or the judgment of his peers?" To the laws of *what* land are we here directed for protection? Why, to *the laws of this state*; and such as might be known and understood by the people of the state *as laws for their direction and government*; laws for the regulation of the internal and civil concerns of the state.

This is the understanding in every instance where the laws of a state or country are spoken of. These laws are never confounded with the law of nations, which has no force over the people individually in any country, but only regulates the conduct of nations *as such*, towards each other. If any duties or obligations are created by the law of nations, as between one country and another, each of these performs such duties and obligations as its own sovereign authority may direct or permit. In an absolute government, the sovereign authority centres in the monarch, who acts in the case, as he alone, of his own arbitrary will, may deem fit and proper. But in a republic the sovereignty resides in the people, and the proceedings must be in conformity with the principles of their government.

It follows, therefore, that when it becomes necessary, in the performance of a national duty or obligation towards a foreign power, *to interfere with individuals*, it can only be done through laws emanating from the sovereign authority of the state where they reside. The statement of a plain and familiar case will be sufficient to exemplify this propo-

sition. Our national government deemed itself under an obligation by the law of nations to observe neutrality in the late Canadian revolt, and to prevent our citizens from taking part in the contest; but did it attempt, in the performance of this duty, to arrest any person with a view to punishment, without laws of congress passed expressly for the purpose? Certainly not.

I have shown, when upon another part of the case, that the statute adopting the common law was not intended to have, nor could have, any effect upon the constitutional provision which I have quoted; but I wish here to add, that the legislature by which that act was passed appear, as if by a prophetic vision, to have anticipated what has actually happened this very day, and, therefore, out of abundant caution, embraced two other provisions in the same law, though they were both already incorporated in our constitutions. The one is that "all the citizens of the United States shall within this state be equally entitled to the privileges of law and justice with the citizens of this state," and the other, "*that no person's body shall be restrained or imprisoned unless by authority of law.*"

The people of this state have become familiar with these provisions of the constitution and the laws, and have viewed them in the light in which I have explained them. They have rested upon them as a complete guarantee of their personal security, and have never, for a moment, suspected that they could be arrested and imprisoned except by virtue of some law of the state, or of the United States. Much less has it entered into their imagination, that the governor of the state had a right *to issue his order for the arrest of a citizen, and his transportation to a foreign country.*

But a new and extraordinary doctrine has been published among them. They are now informed that they have been laboring under a delusion, and that their fancied

security was but an idle dream. They are given to understand that they can no longer place their hand upon the book containing the constitution and laws of the state, and say, here is my defence and my protection; this is my political bible. Yes, the honest farmers and mechanics of Vermont are directed to Grotius, to Puffendorf and Vattel, to learn what measure of personal liberty they are entitled to, and how far they can sit in security in the midst of their families.

It is admitted on the other side, that the national government possesses jurisdiction over the matter, and yet all our presidents have considered themselves unauthorized to act without treaty stipulations, or a law of congress. Has the governor of a state, then, a greater right to act without legislative authority than the president of the United States? The governor of this state is an officer with defined and very limited powers. It is said that he is to "take care that the laws be faithfully executed," but this means the laws emanating from the legislative branch of the government. So it is expressly made the duty of the president to "take care that the laws of the United States be faithfully executed," and we have seen how that duty has always been construed.

And to what power is it desired to surrender the prisoner? To the government of a foreign province where we have already seen the civil law, and trial by jury, suspended, and where, if it is not to day, it will probably be again to-morrow. Every man is to be presumed innocent until proved guilty, and is entitled to a fair and impartial trial. And who believes that an American citizen could now have such a trial in Canada? And has not enough of American blood been shed there lately? Must we at all hazards furnish them with more?

But it appears that the king of England, with all the royal prerogatives, does not possess the power which is



claimed for the governor of this state. The provision of our constitution which I have endeavored to explain was copied from the great charter of English liberty, and has there been understood in a different sense from that which is here contended for. Sir W. Blackstone, in the first volume of his celebrated commentaries, makes the following remarks :

“ A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases ; and not to be driven from it unless by the sentence of the law. *No power on earth, except the authority of the parliament, can send any subject of England out of the land against his will ; no not even a criminal.* To this purpose the great charter declares that no freeman shall be imprisoned, unless by the judgment of his peers, or by the law of the land.”

I must be allowed here to remark that I can scarcely believe it a reality that we are now disputing the question, whether the governor of this state can exercise an authority over the person of the citizen, which the crown in England does not possess. The very thought produces the most chilling sensations.

And shall Vermont—the genuine republican state of Vermont—lead the way in so dangerous an encroachment upon the personal liberty of the citizen ? Shall Vermont—in every line of whose constitution and laws something can be found guaranteeing the security of the people—stand foremost in so glaring a violation of their dearest privileges ? Should this indeed prove so, then would the state be shorn of her glory, and her people be called to mourn over their departed rights. Then would the very green with which her mountains are dressed, fade and lose its color, and the lilies of her valleys droop and perish.

If it should be adjudged that the governor of this state

has the power to surrender the prisoner, he will have equal authority to deliver over any other person that may be demanded by the governor of Canada. All will be at the discretion of one man. And if this is really considered a matter of *obligation*, he will be as much bound to surrender for one crime as another. There is no exception as to political offences. If we once give ear to the idea that this obligation exists, we shall be launched upon a sea of trouble. And shall it be said that we have forgotten or repudiated the doctrine, that discretion is the law of tyrants and belongs not to the genius of our institutions?

And what in that event would be the situation of many unfortunate persons who have sought refuge among us from the storms of political persecution. No one is authorized to say that the governor would refuse to surrender those. And how could he refuse, if the *obligation* exists which is contended for. Besides, all that may have been concerned in any affray, though even in their own defence, may easily be indicted for murder, in the present state of things in Canada, or for some other offence which may not *appear* to be of a political character. Those persons have thrown themselves upon the protection of our laws, and considered themselves safe under the provisions to which I have referred. And shall they have only the miserable satisfaction of exclaiming "The *voice* is Jacob's voice, but the *hands* are the hands of Esau?"

As between the several states of our union the surrender of fugitives from justice is made a positive duty by the constitution of the United States, and yet congress deemed it necessary to pass a law regulating the manner in which that duty should be performed. What an overpowering commentary this is upon the doctrine contended for, that as between one of our states and a *foreign power* no law is necessary. In truth, this alone is conclusive in the case.

It has been said that the practice of surrendering fugitive

felons has long prevailed both in the national and state governments, but this is wholly an error. The national government has uniformly refused to surrender, except under Jay's treaty, while that was in force. Neither has there been any such practice in this state. The case of Griggs, which has been mentioned, had he been surrendered by governor Tichenor, would have come under Jay's treaty, then in force as a law of the country. But it is now admitted that Griggs was not surrendered. It is stated that governor Butler made an order of surrender, but that the person upon whom it was made could not be found.

In the year 1825 an application was made by the governor of Canada to me, as governor of this state, for the surrender of two men charged with stealing, and I answered that I had no power to surrender any man whatever, to a foreign government. Here I wish it to be distinctly understood, that I do not introduce or remark upon my own decision as an authority upon the principle of the case, but merely *as a fact*, to show that if one order was made for a surrender, a refusal took place in another case; which contradiction settles no practice. I do, however, contend that the decision made by me was approved by President Adams, as appears by Mr. Clay's letter to me, and which has been read; and *so far* we exhibit the documents in that case as an authority.

Not a man, then, not a solitary man, has been actually surrendered on the part of this state. Nor have we seen any thing of the order said to have been made by governor Butler, but take it from hearsay. It is true that three or four persons appear to have been surrendered on the part of Canada by virtue of applications from this state, but none of those were British subjects.

Fourth. The obligation or practice of surrender should be mutual, but it cannot be so here, since the governor of Canada does not possess the authority to give up British subjects; and, consequently we ought not to deliver American citizens on our part.

In the case of Fisher, judge Reid of Canada expressly placed the surrender upon the ground of his not being a British subject ; and attached to the report of the case may be found the section of the *habeas corpus* act for that province, by which it is provided that no subject can be sent prisoner out of the province to a foreign country. We are called upon, therefore, to do what cannot be reciprocated.

It has been said by the counsel opposed to us, that "no power has the right to demand, that does not admit the duty of surrendering; that the right and duty must be reciprocal." This is true, and for that very reason Canada has no right to make this demand. As she does not admit the duty of surrendering *subjects*, she has no right to demand *citizens*. Shall we acknowledge that Americans are less worthy, or less deserving of protection, than Englishmen or Canadians?

If such degradation can be submitted to, then have I forgotten the character of our citizens, and of our judiciary, or they have wonderfully changed. Yes, the judiciary. It is here : it is to the supreme tribunal of law in the state that we have come for defence and protection against the arm of lawless power. We stand in the sanctuary of justice, with the constitution and the laws for our shield. It is the last resort, the final appeal. And when the freedom of this people, or of any other people now free, shall be doomed to destruction, it will be in their halls of justice, where the expiring agonies of their liberties will be witnessed.

It appears that the governor has, in his order or warrant, declared the prisoner to be a foreigner. How he was induced to do this it is not my purpose to inquire ; but the statement itself is a palpable and notorious error. It was well understood from the beginning that Holmes was an American citizen, and even his birth-place known. But to place the fact beyond all doubt or cavil, we have proved him to have been born in the state of New Hampshire, where his parents still reside, and that he is fully vested

with the character and privileges of a citizen of the United States. Although we insist that the want of legal authority in the governor extends to foreigners as well as to citizens, we wish to avail ourselves of the fact in this case that the prisoner is an American.

In conclusion, I beg leave to remark, that if we have succeeded in nothing more than to render the case doubtful, in the opinion of the court, the surrender should not be made. In that case we ought to wait until the question is more clearly settled. The escape of one man, even if it should be the escape of a guilty man, is infinitely preferable to a surrender upon doubtful grounds, and which may so easily prove to have been wrong. In the one case there will be no remedy, nor any escape from disagreeable and painful reflections. In the other it will at most be but the escape of one man; and perhaps not even that, as the same man may possibly still be found and reached. Besides, the prisoner has already been six months in confinement, and has suffered not a little.

But we feel the strongest confidence that the court will be convinced that we are well founded, at least in some, if not in all, of the principles we have advanced, and that the prisoner will be set at liberty. In this confidence we now submit our cause.

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MR. CUSHING'S LETTER TO ELLIS GRAY LORING.

MY DEAR SIR.

In the course of my labors, as one of the commissioners on the criminal law of this state, I have found it necessary, as you supposed, to pay some attention to the subject of extradition, or, as we commonly express it, the surrender of fugitives from justice; and, agreeably to your request, I proceed now to give you the result of my investigations, so far as the general principle on the subject is concerned.

The term *extradition*, which is in use among the publicists of modern continental Europe, seems to be somewhat broader in its meaning than merely the surrender of fugitives from justice, and to include also the delivery up of persons charged with crimes against the government of a country other than that in which they are resident, whether they have fled from the former, on account of a crime previously committed therein, or have committed the offence in the latter only.

If the criminal codes of all countries were alike, it might be doubtful whether it would be expedient to allow of extradition in all cases, and particularly in offences of the lowest class; but when the very great diversity in the penal codes of different countries is considered, the difficulty in the way of the admission of so broad a doctrine is very much increased. This difficulty is so great, that, in practice, extradition is limited to a few offences of the very highest kind. The decision of the question, to what offences extradition shall extend, is intimately connected with and dependent upon the ultimate grounds of the power, right, and object of punishment;—subjects, which have as yet been very little considered in this country, and upon which thinkers and writers in other countries are by no means agreed.

The general question, whether a nation is bound by the law of nations to surrender up fugitives, has been much discussed in New York and Pennsylvania, and in the former has received an affirmative, but in the latter a negative, decision. Chancellor Kent, by whom the decision in New York was pronounced, in his commentaries (vol. 1, p. 37,) gives the sanction of his authority to the doctrine, that—“every state is bound to deny an asylum to criminals, and, upon application and due examination of the case, to surrender the fugitive to the foreign state where the crime was committed. The language of the authorities is clear and

explicit, and the law and usage of nations rest on the plainest principles of justice. It is the duty of government to surrender up fugitives upon demand, after the civil magistrate shall have ascertained the existence of reasonable grounds for the charge, and sufficient to put the accused upon his trial." He adds—"The only difficulty, in the absence of positive agreement, consists in drawing the line between the classes of offences to which the usage of nations does, and to which it does not apply, inasmuch as it is understood, in practice, to apply only to crimes of great atrocity, or deeply affecting the public safety."

On the other hand, the late chief justice Tilghman, of Pennsylvania, in the case of the *Commonwealth v. Deacon*, (10 Serg. & Rawle's Rep. 125,) maintained the opposite doctrine, (which was that also of lord Coke) in a very learned and elaborate judgment; and Mr. Justice Story, in his commentaries on the *Conflict of Laws*, (p. 520) without expressing any opinion of his own, presents the opposing views of different writers and judges, on the question. Chancellor Kent supports his doctrine by the authority of some of the older writers on public law, as Grotius, Heineccius, Burlamaqui, Rutherforth and Vattel; but Mr. Justice Story shows that other writers of the same school and of equal merit, as Voet, Pufendorf, and Martens, entertained the opposite opinion. The chancellor, therefore, evidently uses too strong language, when he says that the doctrine adopted by him "is declared by the public jurists;" which would only be correct, if there was no discrepancy of opinion among them on the point. If you desire to make yourself acquainted with the exact state of the doctrine in this country, you will find all the cases and authorities referred to in the "*Conflict of Laws*," p. 521.

The difference between the two doctrines is, that the one considers extradition a matter of strict duty, while the other regards it only as a matter of national comity. The dis-

tion is very important. If it be a matter of strict duty, on the part of one nation, to deliver up fugitives from the justice of another, then it is a matter of strict or perfect right on the part of that other to demand such surrender, and to consider a refusal to comply with the demand as good ground of war. But, if it be a mere matter of national comity, in reference to which a nation is to exercise its discretion, then the corresponding right is one of imperfect obligation, (as it is termed by Vattel,) the non-performance of which is not a justifiable cause of war.

This distinction is equally important in another point of view. If extradition is a national duty, or, in other words, if it is a principle of the law of nations, and so a part of the common law, it would seem, that it must be enforced by the judiciary as such, in all those states where the subject is not regulated by any statute provision. If, on the other hand, it is a matter for the exercise of national comity, in which a discretion is to be exercised, then it seems to me, that it is for the government exclusively, and not for the judicial department, to decide in each particular case, whether the offender shall be delivered up. In this latter case, too, if there be no express statute provision, by which the subject is regulated, it would seem that no particular department of government, under our forms, can have authority to act in the matter; and, consequently, that where there is no statutory regulation, each particular case must be deemed to present a question for the consideration of the sovereign power; that is, for congress, or for the state legislatures.

If the doctrine laid down by chancellor Kent, in his commentaries (as before cited), and supported by some of the older writers on public law, be correct, there is no discretion to be exercised in the matter; and, consequently, extradition must always be allowed when demanded (except in offences of a minor character), at the risk of just cause of war. I



have already remarked that the doctrine, thus broadly stated, though sanctioned by the writers referred to by the chancellor, is not supported by all the writers of the same school and period; and the opposite opinion seems now to prevail generally among the publicists of more modern times. Mr. Wheaton, the latest writer in English on international law, lays down what I have no doubt is the true principle in the following terms:—"No sovereign state is bound, unless by special compact, to deliver up persons, whether its own subjects or foreigners, charged with or convicted of crimes committed in another country, upon the demand of a foreign state, or its officers of justice. The extradition of persons charged with or convicted of criminal offences affecting the general peace and security of society is, however, voluntarily practised by certain states as a matter of general convenience and comity." (Wheaton's international law, p. 111.)

I have been able to examine but few of the modern works on public law, in which this subject is treated incidentally; and I have seen none of the many publications (principally in Germany) of which it is the special subject. But from those which I have seen, and from notices of others, I have no doubt that the doctrine of Mr. Wheaton is now the acknowledged doctrine of the publicists of modern continental Europe.

The following is extracted from a short review of a work on extradition, in the New Archives of criminal law, vol. 13, for 1833, p. 145, and following: "If we examine the opinions which prevail in Europe, on the subject of the delivery of persons charged with crimes, we shall readily perceive that there is no uniformity in them. Individual states conclude treaties with each other, in regard to extradition, in which the crimes on account of which they are willing to deliver up offenders are particularly specified; and the existence of these treaties leads to the conclusion, *argumento ab con-*

*trario*, that in the absence of a compact to that effect, there is no obligation upon any state to deliver up offenders fleeing to it from other states, and that there can be no extradition for any other crimes than those which are mentioned in the treaty. The latest writers on public law also take notice of this variety of practice, as for example, Pinheiro-Ferreira, (formerly minister in Portugal,) in his *Cours de droit publique interne et externe*, (Paris, 1834, vol. 2, p. 24—34) and an excellent German writer in the *Minerva* for October, 1831, (p. 102,) in which the well known case of Gallotti is examined." "It is worthy of remark, too, that according to the most recent authority (*Le ministere public en France*, par Ortolan et Ledean, Paris, 1831, vol. 2, p. 231,) extradition is no longer allowed in France, in any case."

I have not been able to obtain either of the works referred to in the preceding extract; but I have seen other writings of one of the writers (Pinheiro-Ferreira,) in which the statement of his opinion is corroborated. In an article, published in the *Revue Etrangere et Française*, vol. 1, p. 74, this author makes the following remarks:

"From what has been said, it is easy to conclude, that extradition cannot take place in any case, except where the party is convicted of having voluntarily contracted an obligation of personal service, from which it is not possible for him to buy himself free. Such, for example, would be the case of a mariner, who, having engaged himself for the whole voyage, should stop at the port of discharge."

The same author, in his recent edition of Vattel, has the following note to book 1, § 233.

"As to what he (Vattel) adds on the subject of extradition, we cannot accord it in any case, for the following reasons.

"Extradition cannot take place but in virtue of a judicial decree, or of an order of the government, independently of the judicial administration of the country. As to the

judicial decree, it must be admitted, either that the refugee has been found guilty, or that he has not been so. If he has been convicted, the judge can only inflict upon him the punishments decreed by the penal code, the execution of which belongs to the government of the country and not to that of the condemned. The latter ought, therefore, to suffer the punishment in the country to the laws of which he has subjected himself.

“As to the other hypothesis, that the government ought to deliver up the offender, without waiting for the decision of the tribunals of the country, it is a doctrine which cannot be reconciled with the principles of constitutional law, which guarantees to every one the full enjoyment of his rights, so long as he is not divested of them by a judicial decree.”

A French writer on criminal law, Legraverend, *Traité de la Legislation Criminelle*, tom. 1, p. 109) considers extradition as a matter of national comity only, “*sans la décision des gouvernemens.*”

If, as I think has been shown, extradition is a matter of national comity, and not of strict right, it becomes a question of exceeding importance, to decide upon whom rests the responsibility and the duty of exercising this comity, whenever a case arises for its exercise. Whatever may be the decision of this question in governments more or less absolute in their character, I think there can be little doubt in relation to it in strictly limited governments like our own. Under our forms, no functionary of government has any power but that which is, in some mode or other, expressly delegated to him; and this general proposition, though operating differently in the two cases, may be equally affirmed of both the state governments and the government of the union. Is the power to exercise this international comity now conferred upon any department of either the national or state governments? I think clearly not. How

then is it to be exercised? I answer, that, in the absence of all statute regulation, by which the power is delegated, it seems to me very clear, it can only be exercised by congress, or by the legislature of a state, according as jurisdiction of a particular case belongs to the one or the other.

The conclusion to which I have been led is,—that extradition is a matter of national comity, and not of national duty;—that a nation may consequently refuse to grant it, without affording just cause of war;—and that in this country, it is only for the legislature, as the sovereign power, to exercise it, either by means of some general law regulating the subject, or, where there is no law, by acting directly in each particular case that occurs. In coming to this conclusion, I have been governed solely by the weight of modern authority, unaided by speculative reasoning, or considerations of public policy, (which would have extended this letter to an inordinate length,) though I am persuaded that these grounds would be found equally conclusive.

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**ART. VII.—A SKETCH OF THE VARIOUS THEORIES CONCERNING THE RIGHTFUL FOUNDATION AND THE OBJECT OF PUNISHMENT.**

[For the materials from which we have drawn the following article, we are chiefly indebted to the first volume of the theory of the (French) penal code, by Messrs. Chauveau and Helie, and an article by Mr. Pistor, in the second volume of Mr. Wolowski's Review.]

It is not improbable, that all systems of criminal law had their origin in the instinctive feeling of revenge. In a rude and uncivilized state of society, when one had committed an aggression upon another, the injured person forthwith revenged himself in the best way he could; but, if, in revenging the injury committed on himself, he exceeded the limits of what

other members of the society regarded as a just vengeance, he was in his turn subjected to punishment. When a considerable number of offences of the same nature had been committed, and had been punished by the injured person or some one on his behalf, in a similar manner, this succession of offences and punishments became the foundation of a rule, which in due time received the form of a law. The sovereign power, also, proceeding upon the same instinctive feeling, threatened particular acts which it desired to prevent, with analogous punishments; and, thus, from these two sources, was gradually formed, in process of time, and with the progress of civilization, a body of criminal laws.

Penal systems were consequently originally formed without much regard to the abstract right or the proper end of punishment. Certain injurious acts were to be prevented; and the readiest means which presented themselves were adopted for that purpose. With the progress of civilization, however, punishments, which were once in harmony with men's feelings, came to be regarded as barbarous. The subjects of the abstract right, and of the end of punishment, began then to attract attention.

About the middle of the eighteenth century, Beccaria advanced the doctrine, that all chastisement is unjust, when it is not necessary to the preservation of the public liberty. The foundation of the right of punishment, according to Beccaria, is the right of society to defend itself. He supposes an original compact, by which men, previously independent and isolated, became united in society, and sacrificed a portion of their liberty, in order to enjoy the residue in greater security. The sum of all these portions forms the power of the nation, deposited in the hands of the sovereign. Hence, it follows, that every exercise of the right to punish, which is not absolutely necessary to the defence of society, is an abuse and not a right.

This system of defence has been followed by the French

and English writers, since the time of Beccaria. Mably and the French philosophers of the eighteenth century embraced it; and, on the same principle, Rousseau founded the laws of his Social Contract. The doctrine was also laid down by Blackstone in his Commentaries, and by Phillips in his work on juries. Vattel and the writers of his school recognise as the basis of the right of punishment the necessity of securing the safety of the state and of its citizens. Two objections may be urged against this system. The first is, that the doctrine of the social compact, or of an anterior consent of individuals in relation to the application of punishments, is a mere fiction. The state of society is a moral necessity of human nature; and all history proclaims, that the social is the natural state of man. In the second place, the right of lawful defence is not coextensive with the right to punish, and, consequently, cannot be the basis of the latter. The right of lawful defence is the natural right to repulse force by force, or, in other words, the right of war. But this right ceases with the aggression which gives rise to it; and when the danger is over, and the aggressor disarmed, the right to strike in lawful defence is certainly at an end. The right to punish, however, extends beyond the immediate danger of the attack; and is usually applied long after any danger from the offence is apprehended. If the right of lawful defence against aggression be distinguished from the right to guard against attack, it seems clear, therefore, that the former cannot be the foundation of the right to punish.

The theory of lawful defence, notwithstanding these objections, has been maintained by some distinguished writers, but with important modifications. Abandoning the fiction of an original compact, they consider it the duty of man to live in society, and they attribute to society, in its collective capacity, a power to intervene for the defence of a right attacked. The natural limit to this intervention is the secu-

rity of the right which its object is to defend. In this system, consequently, crimes are only considered in their relation to the preservation of society; every repressive action which exceeds this end ceases to be lawful. The partisans of this system have at the same time attempted to make it coincide with the principle of moral justice. The legislator acts in virtue of the right of defence, but his action must be confined within the circle traced by the rule of justice; he may denounce as crimes acts which are injurious to society, provided only that they are culpable in the eye of human conscience. This is the doctrine of several late French writers, namely, of Lucas, Comte, and Pastoret. This system, which may be called the theory of indirect defence, is the system of Beccaria, limited and controlled by the principle of moral justice. Under the first point of view, its advocates appear to consider defence as the right only of opposing a barrier to the action of crime; the power of society is to be exerted to defend and not to punish. But, against whom is this defence to be directed? Not against the delinquent, certainly, who has been seized and disarmed; for, as already remarked, the right of defence cannot survive the attack. It must consequently be directed against future delinquents,—against crimes hereafter to be committed. But this amounts to introducing into the law the principle of intimidation, the direct consequence of which is to exaggerate punishments. This inevitable tendency is weakened, in fact, by the secondary effect of the principle of moral justice, the object of which is to proportion punishments to the intrinsic nature of the acts denounced as crimes. But this alliance of two rules, which, if not contradictory, are at least very distinct, breaks the unity of the theory, and continually embarrasses its application. It is in this point of view, particularly, that this system has been the object of criticism.

The system of general utility, advanced by Bentham,

next demands our attention. "That which justifies punishment," says Bentham, "is its greater utility, or, to speak more properly, its necessity. Delinquents are public enemies. Where is the need of asking enemies to consent to being disarmed or restrained?" In this doctrine, general utility is the principle; the material end of punishment, its dominant idea, is the effect of punishment on the multitude, or intimidation. It is of little importance to the legislator, whether the distribution of punishments conforms to the rules of real justice, for an apparent justice has the same effects. Penal law has but a single object, which is to impress upon the citizens the terror of punishment; as its incriminations are founded on the single basis of the interest of the majority of society in the repression of acts denounced as crimes.

If we examine this theory in the absolute point of view, in which it is above presented, it will be easy to perceive its defects. It is nothing more than an application to society in general of the principle of personal interest. But, if this principle is not an adequate rule for our actions and our duties, how can it suffice to legitimate punishment? Utility is a necessary element of all punishment, in this sense, that no useless punishment ought to be applied, but this utility does not constitute a right; for how shall it be established? Will it not vary, according to an infinite diversity of circumstances,—the climates, wants, habits, and manners of nations? It is not a principle, but a fact; and, consequently, a movable basis, susceptible of infinite modifications. With such a rule, what security would the members of the social body have against arbitrary power? What is to prevent an act, which is to day innocent, from being made an offence tomorrow? Who shall set limits to the incriminations of the legislator, or to the exaggeration of punishments? The general utility, a vague and indefinite expression, can justify every thing, even atrocities.



It ought to be remarked, however, that this system might lose the greater part of its inconveniences in the hands of a legislator, who regarded the utilitarian principle as the well understood utility of society. The first want of society is an exact distribution of justice ; but, such a result, in the case supposed, would be due to the secondary influence of a moral principle, and not to the application of the doctrine of interest.

The last theory which we shall mention, before proceeding to an examination of the systems professed in modern times by the German philosophers and jurists, is that advanced by the celebrated professor Rossi, in his treatise on penal law. Rejecting both the principle of utility and that of lawful defence, this author seeks for the principle and the reason of penal justice in the moral law revealed to us by conscience. This tribunal of conscience, which separates the evil from the good, the just from the unjust, reveals to man the immutable rules of duty, and teaches him that he is responsible for his actions. The moral duty and the responsibility of a free and intelligent being are the basis of penal justice.

But man must not be considered merely as an isolated being ; society has been given to him as a means of assistance and development ; it is his natural state ; and social existence is one of his duties. This principle, when combined with the first, leads to the corollary, that society or the social power which represents it has the right to punish those who disturb it ; but that this right to punish is subordinated in its exercise to the existence of the violation of a duty, to the existence of a moral infraction. In this theory, therefore, punishment is not an evil inflicted for the interest of any number of individuals whatever, or with the view to produce an useful impression on the multitude. Punishment in itself is only the reparation of a violated duty, the retribution of evil for evil.

As the application of punishments, however, has for its final end the preservation of the social order, there exists another indispensable element of this application. Absolute justice is not the same thing as social justice, though they are both derived from the same source. Social justice is limited by the wants of the social order and by the imperfection of its means of action. The legislator would consequently exceed his powers, if he should inflict punishment upon an act, the repression of which was not demanded by the social order, or the prosecution of which would lead to more damage than benefit to society. Here we meet again the principle of utility, but as an element merely, and not as a circumstance constitutive of crime. The legislator may be deceived, in what he supposes to be the expression of a social want; but his error will be the less dangerous, because the utility of a punishment is not enough of itself to make an act criminal; the act must also be criminal in the judgment of conscience.

The conclusion is, that penal justice cannot lawfully be exercised, except so far as the punishments which it inflicts are founded upon the following conditions, namely: 1, that the act to be punished is immoral, which constitutes the intrinsic justice of punishment; 2, that the punishment is necessary to the preservation of the social order. These are the rules, which form the basis of the theory proposed by Rossi.

These different systems may be summed up in a few words. One derives the right to punish from an original compact between the members of society; a second refers it to a right of defence which it attributes to the social power; a third to an exclusive principle of utility; and a fourth to the principle of moral justice.

Mr. Livingston does not adopt any one of these theories in his system of penal law; he rather seems to approve of them all. He remarks, that, "if the supposed social con-

tract ever existed, the foundation of it must have been the preservation of the natural rights of its members. And this makes it, in all its effects, the same as the theory which adopts abstract justice as the basis of the right to punish; which, properly defined, is only that which secures to every one his right; and, if utility, the remaining source to which this power is referred, be found to be so closely united with justice, as in penal jurisprudence to be inseparable, it will follow, that any system founded on one of these principles must be supported by the other." Though Mr. Livingston does not expressly give his sanction to any of the theories of the right to punish, which have been mentioned, he seems nevertheless to have had one of his own. In the introductory title to his "system of penal law," he lays down the following "fundamental truths," as the basis of the legislation which he recommends to the state of Louisiana.

"Vengeance is unknown to the law. The only object of punishment is to prevent the commission of offences. It should be calculated to operate :

"First, on the delinquent, so as by seclusion to deprive him of the present means, and by habits of industry and temperance, of any future desire, to repeat the offence ;

"Secondly, on the rest of the community, so as to deter them by the example, from a like contravention of the laws. No punishments, greater than are necessary to effect these ends, ought to be inflicted."

We come now to the theories, which have been professed by the German philosophers and jurisconsults. They may be divided into three kinds : 1, absolute theories, in which the right to punish is justified in itself ; 2, relative, in which the right to punish is justified by the object which the legislator has in view ; and, 3, mixed theories, in which several objects are proposed.

Of the absolute theories we shall notice those of Kant, Henke, and Jarke ; of the relative, those of Böhmer,

Gmelin, Feuerbach, and some others; and of the mixed, those of Leyser and Welker.

#### ABSOLUTE THEORIES.

1. *Kant.* This philosopher and his school admit the absolute principle of the law of retaliation. But this expression must not be taken literally; for it does not refer to the external form of the punishment, or require that the punishment should be identical with the evil committed by the offender. The application of such a principle would be altogether too ridiculous to be attributed in good faith to the genius of Kant and his school. This system regards the offender as a being who has broken with society, and who has consequently put himself out of the protection of the law. In order to enable him to recover his social position, the evil which he has committed is to be effaced by the evil which he is bound to suffer, which is nothing more than the reaction against his own act: "The evil which thou doest to another falls back upon thyself."

In virtue of this principle, the punishment, though identical in its nature, must, in its form and application, be adapted to the individual and to circumstances. It is easy to see, that this theory, however absolute it may be, always comes back to the existence of a social contract.

To the objection, that the offender who loses his social rights is sufficiently punished, and that society has no other right than that of expelling a member who has failed in respect to the law, Fichte answers, that it is for the interest of the offender himself to be punished, and that society ought not to suffer the loss of one of its members, who may still be useful, after being reconciled to it by the expiation of his crime. This mode of justifying punishment is wholly fictitious; for a contract is not obligatory, unless it is agreed to without constraint and with full knowledge of the subject.

It would be quite absurd to undertake to apply this theory in Germany, where there is neither any social contract, nor any general concurrence of all the citizens in the making of the law. As to the supposed interest of the offender in suffering the punishment, according to the argument of Fichte, it would at least be necessary to ascertain, whether he was willing again to enter society.

2. *Henke.* The sentiment of the just and the unjust is innate in the heart of man. Society develops this sentiment and sanctions it by public institutions. He who attacks the law must necessarily experience the reaction of the law. This reaction, which is necessary, spontaneous, and proportional to the principal action, is the penal effect of the law.

To this theory, there are three principal objections. *First*, in point of principle, it confounds absolute justice with the tenor of positive law. A principle has no need of the hand of man to exist; it demands neither threats nor punishment; and, least of all, does it require the employment of force to sustain it. *Second*, in relation to the special law, it admits that the penal law is the expression of justice, that is to say, it takes for granted what it ought to prove. A law dictated by the sovereign power may be useful to certain interests; but it is not for that reason just. If this were not so, all laws would be just, and there would no longer be any bad or any good laws. *Third*, in relation to the individual, the sentiments and ideas of what is just and what is unjust differ according to persons, manners, and circumstances; and, consequently, the theory is wanting in a general basis.

3. *Jarke.* It cannot belong to man to judge of and to condemn his neighbor. It is only in virtue of a divine mandate, that the sovereign maintains order in the state, and punishes those who despise the celestial commands. But the will of God is not manifested in the laws of nature

alone; it appears also in the social state into which men are organized. It is, therefore, in virtue of this supreme will, of which the law is merely the expression, that the guilty are subjected to punishment.

This theory differs from the preceding only in this: it puts God in the place of a principle, and a human mandatar in the place of a special law. It is the theory of Henke personified.

#### RELATIVE THEORIES.

1. *Böhmer, Gmelin.* The most popular and the most unjust of all theories, says Henke, is that which considers punishment as a means of inspiring horror for crime. The vulgar mind scarce makes any difference between the legal foundation and the object of punishment; and as men generally think rather of what is useful than of what is just, we can readily understand that the theory of intimidation is the most ancient. At the present day, the partisans of this school in Germany are not numerous. It is no longer thought right to make use of the person of a criminal, to remove illegal temptations from the minds of the rest of the citizens, by the example of his torments. Philosophers and jurisconsults are agreed, that man ought not any longer to be an instrument of society; on the contrary, he is above society; and the latter, in relation to him, is only a means of assuring him the liberty of his person and the security of his property. But what do the partisans of this doctrine require? They make use of man as of a thing which belongs to them of right; without inquiring what the source is from whence this prerogative flows,—what would be for the interest of the criminal,—what society might gain by improving him,—and whether some other remedy might not be devised, to prevent the evil which they abhor, and which they seek to make detested. The person of an offender is made use of to present a barbarous spectacle, which may frequently become dangerous.

The sentiments of justice, of goodness, and of virtue, are the result of a moral faculty, which is not produced either by horror or by interest. Punishment has only a negative effect; a legislator, who thinks to prevent evil by evil, descends from the elevated point of view of justice, to become a partisan; his intervention has the character of vengeance; it irritates instead of convincing; the horror of the punishment takes the place of respect for the law; and as soon as the offender is sure to escape from the hands of the executioners, he no longer has any reason for not yielding to his criminal temptations.

2. *Feuerbach.* The following sentences of Seneca (*de ira, lib. i. cap. ult.*) express the theory of this celebrated criminalist: *Nemo prudens punit quia peccatum est, sed ne peccetur. Renovari enim præterea non possunt, futura prohibentur.* This was also the theory of Plato; and it has been embraced by many modern jurisconsults. It admits in human nature two inclinations, one to evil, and the other to good. Man is thus vibrating between the advantage which would result to him from a violation of the law, and the evil which would follow the execution of his criminal project.

In this struggle, it is the business of the legislator to intervene, and to repulse the criminal desire by the prospect of a punishment, which must consequently be more powerful than the temptation to crime. In this manner, penal legislation acts as a psychological restraint, and makes the balance incline in favor of legal order.

It has been objected against this theory, that it is subject to the defect common to all the preventive theories. If other persons besides the offender himself are to be deterred from the crime, then the offender is made an instrument to frighten others. But if it is necessary only to prevent the offender himself from repeating his unlawful act, then it cannot be necessary to punish in a case where a repetition of the offence is evidently impossible.

Besides, this theory has no general foundation ; for the inclinations to good and evil being of a different nature, and of unequal power according to the characters and inclinations of individuals, it follows, that it would be necessary to establish a particular penalty for each individual, and to inflict it in such a manner, that the punishment should always be the opposite extreme of the inclinations of the offender. No one can pretend, that the desire to do evil, and the fear inspired by the prospect of chastisement, act in the same degree in all cases, in all circumstances, on all individuals. The system of Feuerbach has, notwithstanding, been adopted in Bavaria, and constitutes the foundation of the new criminal code of that country.

To the text of the Bavarian code, notes have been added by another very distinguished jurisconsult, Gönner, who died some years since at Munich. These notes, which have the force of law, very frequently derogate from the principles advanced by Feuerbach. It must be added, also, that the author, by bringing forward several other principles, among which is that of moral constraint, seems to have abandoned his theory. The gradation of punishments in Bavaria is regulated by the feelings of the jurisconsult ; and a crime is punished with severity or otherwise, according to the opinion entertained by Feuerbach of the temptation to commit it.

3. Other systems, which have been taught with more or less of success, do not undertake so much to establish the right to punish, as to indicate the object of punishment. Almost all are agreed upon the point, that punishment ought not to be vengeance : but some propose to defend the state, as *Martin* and *Schulze* ; others to restore violated rights, as *Klein* ; others propose to improve the person of the guilty, as *Spangenberg* and *Helzer* ; some philosophers only have entirely rejected the right to punish as immoral and unworthy of a civilized society, as *Abicht* and *Krause*.



These authors protest vividly against that elasticity of the common law, which is made to bend to the will of the majority, and destroys individuality in order to preserve the integrity of the body politic. According to them, absolute justice, that is to say, natural right, being once admitted, can never receive any modification, whatever may be the circumstances, the number, and the quality of the persons who demand it. Thus, the interests of an individuality, by the side of which reason and right are found, ought never to be sacrificed to ideas of generality. On the other hand, however, these authors admit, that an offender sins only because he is weak or drawn into error. It is necessary, therefore, to take measures for his improvement; but such an influence of the body politic upon the individual, does not deserve the name of punishment.

#### MIXED SYSTEMS.

The mixed systems, the most complicated of which have been developed by Leyser and Welker, propose to effect several objects at the same time by the application of punishment; as to indemnify and avenge the person of the injured party, to give satisfaction to the violated law, &c.

If all the relative theories are each the result of a personal sensation, or the expression of an object purely political, the mixture of all these doctrines must necessarily increase the uncertainty and confusion, when an application is made of them in one and the same system of law.

Besides, the mixed theories add nothing which can justify punishment; for the pretended greatest utility is not the criterion of the just; otherwise there would be no principles, but only interests; and right would always be on the side of the greatest number.

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The above are some, probably not all, of the theories, which have been assumed in modern times, particularly in

Germany, as the basis of the right or of the object of punishment. In this country, very little attention has been given to the subject. Our criminal law is almost wholly of modern growth, and the result of our own positive legislation. We have had no ancient abuses to attack or to defend. The question of the abolition of the punishment of death, either wholly or in part, is the only one, we believe, which has led our jurists and legislators to investigate the nature of the right of punishment; and this question, whenever it has been brought to the decision of our legislative assemblies, has been decided upon practical rather than theoretical grounds.

In regard to the subject of prison discipline, and the improvement of the moral condition of criminals, the latter has been admitted as one of the legitimate objects of punishment, without stopping to inquire whether it is the only or ought to be made the paramount one. A knowledge of these various theories, therefore, is not likely perhaps to be of much practical value, in this country; but as explanatory of foreign systems of criminal law, and as the results of much profound and acute investigation, we think the foregoing brief sketch of them will not be wholly without interest for our readers.

L. S. C.

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ART. VIII.—BIOGRAPHICAL SKETCH OF JAMES C. ALVORD.

IN the recent death of James C. Alvord, Esq. of Greenfield, Mass., the community at large, no less than the legal profession, has sustained a severe loss. He died at an age when most men are but just assuming the duties and employments of manhood, and but just emerging from the restless agitations and uncertainties of youth; yet he had done so much and improved his opportunities with so rare a spirit, that he had won the consideration and attained to the excellence, which usually follow years of vigorous

action and manly self-control. His death is not to be lamented as that of a young man of great promise, for in him were combined the assurance which springs from the continued performance of high duties, with the promise that clings inseparably to the early period of life. We saw in him at once the beauty of the bud and of the flower. His death has left a chasm in society which cannot be readily filled. We miss the sagacious statesman, the sound and learned lawyer, the public-spirited citizen, one who had been tried in all the relations of life, public and private, and been found faithful in them all.

He was born in Greenwich, in the county of Franklin, in the year 1808. He was the eldest son of Elijah Alvord, Esq., the clerk of the courts for the county of Franklin. After the usual preparatory studies, he entered Dartmouth college and was graduated with distinguished honor in 1826. Immediately upon leaving college, he entered upon his professional studies, in the office of his father at Greenfield, and prosecuted them further, at the law-schools of New Haven and Cambridge. It was at this latter place, in the summer of 1830, that the writer of this article first became acquainted with him. He bore about him at that time the marks of manifest superiority, and those who became well acquainted with him felt no surprise at his subsequent rapid progress. There was the maturity of manhood, both in his person and in his mind. With the warmth, simplicity and frankness of youth, he had none of its weaknesses and was above its usual temptations. Indolence was impossible to a nature of such powerful activity, and pleasure had no charm to his well-regulated mind. His love of study was seconded by a robust frame and a constitution, apparently, of great vigor. He was at that time, even, a ripe and sound lawyer. He had read extensively and thought deeply on legal subjects, and his knowledge of law was free from that crudeness, usually found in young lawyers, how-

ever much, or rather, however many books they may have read. He spoke with fluent and dignified self-possession; there was no lack of youthful ardor and impassioned power, but his speaking was most remarkable for a certain weight and impressiveness, more natural to the age of forty than to that of twenty. He had none of the reserve and coldness sometimes accompanying young men of his intellectual maturity, but was social in his tastes and ready in his sympathies. He was generous, warm-hearted and cordial, easily winning friends and keeping them when won, and in the interchange of affection giving as much as he received.

Soon after this period, he commenced the practice of the law in Greenfield, and subsequently formed a connexion in professional business with his maternal uncle, the honorable Daniel Wells. He immediately took a prominent position at the bar, passing over at a bound the space which young lawyers are usually doomed to move through at a snail's pace, and without feeling for a moment the heart-sickness of hope deferred, became at once fully occupied with important and responsible business. This early success by no means arose from want of fitting competitors. The banks of the Connecticut have always been fruitful in good lawyers, and never more so than at the present time; and those who know the professional merits of the antagonists, with whom he was called to measure his youthful strength, need not be told that he was not allowed to take the place which he did, without showing the most satisfactory intellectual credentials. His professional labors sustained a short interruption in the summer of 1833, when, upon the lamented death of professor Ashmun, he was selected to occupy his place as instructor in the law school of Harvard University, until the choice of a permanent professor should be made. This was a highly flattering compliment to his professional standing, and the admirable manner in which he discharged the duties of teacher justified the propriety of the choice. As

he was but a year or two older than most of his pupils, his position was not without difficulty, but such was the readiness and extent of his learning, so successful was he in imparting his stores of knowledge, his deportment was so characterized by real dignity and the absence of false assumption, that the most harmonious relations were established between the teacher and the taught, and his labors became as agreeable to himself as they were beneficial to others.

He immediately resumed the practice of the law, in which he was actively engaged during the remainder of his life, except in those intervals in which he was serving his fellow-citizens in a public capacity. He was retained on one side or the other of every important cause which arose in the part of the state in which he lived. He labored conscientiously and assiduously in behalf of his clients. The volumes of the reports will shew how faithfully and elaborately he argued the questions of law which arose in the course of his practice, and in the preparation of the cases which were to be argued before a jury, he was not less diligent and thorough. He was elected by the citizens of Greenfield, a member of the house of representatives, in 1837, and by the inhabitants of the county of Franklin, a member of the senate, in 1838. He was appointed, in 1838, one of the commissioners for codifying the criminal law of the commonwealth. In November, 1838, he was elected a representative to congress from the sixth district, in the place of the honorable George Grennell, who declined a reëlection. But his brilliant career of usefulness and distinction was destined to be soon cut short, and the places that knew him were to know him no more. During the early part of the last summer, he was most laboriously occupied in his duties as commissioner for codifying the criminal law, and in the latter part of it, he was attacked by a disease of the bowels, which, after some weeks of suffering, during which the

minds of his relatives and friends were alternating between hope and fear, resulted in his death on the twenty-seventh day of September last.

From the date of his admission to the bar, Mr. Alvord's professional labors engrossed the principal part of his time and energies, and it is in his capacity of lawyer that his intellectual claims are most fairly to be estimated. Lawyers, even distinguished and successful ones, may be divided into two classes; those who are born lawyers and those who make themselves such. Some men have a certain natural aptitude for the law, and its principles are readily assimilated to their minds. The study of law is a congenial employment, and they find themselves at home in its tangled mazes. Others, on the contrary, seem, in making themselves lawyers, to have overcome a certain natural repugnance. Their minds have been, apparently, forcibly bent from the direction in which they would have spontaneously moved. Mr. Alvord belonged to the former of these classes. He was a born lawyer. His mind had a native affinity for the study of legal rules and principles. He had no repugnance to overcome, no rebellious counter impulses to subdue. His taste for the law was natural and instinctive, and the study of it was a labor of love. He would have been a good lawyer with very little study, for the legal character of his mind would have supplied the deficiencies of book knowledge, and led him by a sort of "*rusticum judicium*" to the same results to which others had arrived by the laborious processes of study. A legal question never looked dark to him; his first glance gave an insight into it, and told him through what course he was to seek for a solution. Many men would have been contented with this original turn for the law, this legal mother-wit, and have preferred to solve the questions which came before them by a sort of Zerah Colburn process, rather than avail themselves of the borrowed aid of the learning of others. But his ambition was of a

nobler and higher kind, and he studied the law as zealously and conscientiously as if his books had been his only guides and dependence. He had that invaluable property in a lawyer—one not often found in combination with a mind so rapid in its movements and powerful in its grasp as his—unwearied patience in legal investigation. He never abandoned his search when half completed. He never rested till he had learned all that could be known upon the subject-matter of his researches. He had made extensive acquisitions in every branch of the common law. Nor did he stop short with that, but his knowledge of the Roman and continental law was sufficient to give him access to their stores, whenever they could be of practical service to him. The case of *Deerfield v. Arms*, 17 Pick. 41, may be cited as an instance of his success in applying the principles of the civil law to practice.

With this native capacity for the law, and with his habits of thorough investigation and hard study, the highest honors and most brilliant success at the bar were open to him. He was not only an excellent lawyer, but an eloquent and impressive advocate, and managed cases before a jury with tact, judgment and skill. The solid rewards of professional eminence were within his grasp, and a high and widely extended reputation was a certain possession. Had he been called to the bench, he could not have failed to prove himself a most valuable magistrate, and would probably have left behind him a judicial fame inferior to that of none of the eminent men who have adorned the bench in Massachusetts.

Mr. Alvord was a member of the legislature of Massachusetts for two successive years, in 1837 in the house of representatives, and in 1838 in the senate. In the house of representatives, he was a member of the judiciary committee and a laborious and attentive one. He prepared a very learned and elaborate report on the right of trial by jury in

questions of personal freedom, which appeared in the thirty-third number of the *American Jurist*, and the law which was passed in conformity with the provisions and recommendations of his report, is to be ascribed mainly to his influence and exertions. He also made an effective speech upon the witness bill, in which he defended the policy of the law which forbids the testimony of atheists from being received in courts of justice. He took an active share in the general business of the house and proved himself to be a ready and powerful debater. He acquired an influence and a consideration very seldom attained by young members in their first session. In the senate he was a member of the committee on probate and chancery. As chairman of joint special committees, he presented reports on the annexation of Texas, on the domestic slave trade and on slavery in the district of Columbia, marked by learning and ability and a generous ardor in behalf of liberty. In the subject of slavery, in general, Mr. Alvord took a lively interest. His views were characterized by an enlightened philanthropy and a zeal tempered with discretion. To slavery in the abstract he was an uncompromising enemy, and he had a strong sense of the evils and the misery to which it gives birth, while the soundness of his judgment and his well-regulated understanding preserved him from fanaticism and extravagance of opinion. In connection with this subject, in particular, we lament his removal from the councils of the nation. His firmness and his love of liberty would have peculiarly qualified him to represent the feeling of New England upon this question, while his sense of justice would have enabled him to perceive what was due to the claims of those who represented a very different feeling. He was one who could never have been bullied or cajoled. He never would have been silent when the cause of liberty or the honor of his country called upon him to speak. Without belonging to any anti-slavery society, he had a strong con-



viction in the ultimate success of the efforts to abolish slavery. In his last illness, he manifested a lively interest in the fate of the captives of the *Amistad*, and regretted nothing more than that he was prevented from offering his services as counsel in their behalf.

Mr. Alvord was an active member of the commission appointed to codify the criminal law of Massachusetts. During the last year of his life he devoted a great deal of time to this important labor. The portion of the proposed code, on the branch of homicide, which appeared in the forty-second number of the *American Jurist*, was prepared by him, and our readers need not be informed of its distinguished merit. To this commission he is a serious loss. His practical good sense and thorough knowledge of law enabled him to shed light upon every point in their progress, while his capacity for labor made it certain that whatever he undertook to do would be done and done thoroughly.

In the preceding observations we have confined ourselves to a consideration of Mr. Alvord's public and professional character, which was the principal object we proposed to ourselves to do; but those who had the privilege of his friendship would feel that we had not done justice to his memory without a tribute to his excellence as a man. He was the personal friend of each of the editors of this journal, and we feel that we have sustained a great loss over and above that which the public laments. What we have said of Mr. Alvord as a lawyer and a statesman, is a revelation of the beauty of his moral nature and of the high principles which governed his conduct. There was no inconsistency or discrepancy in his character. He was a man of unspotted moral purity, of warm and generous affections, of unshaken loyalty to truth; and the foundations of his character were deeply laid in religious trust and hope. His success in life did not impair his simplicity and openness of nature. His aims

and motives were alike elevated. We do not venture to draw aside the veil which separated his domestic from his public life, nor to speak of him in those near and dear relations in which he shewed his most attractive traits. The void that is left in the hearts of that once happy circle can never be filled; and in the early removal of one who was their pride, hope, and joy, they can find no other consolation except in the recollection of his well-spent life and in the assurance of a reunion beyond the grave. G. S. H.

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ART. IX.—ON THE EXTENT OF THE CRIMINAL LAWS.

THE object, which the criminal laws of a state are intended to effect, is twofold: 1, to secure the continued existence and well-being of the state itself as such; and 2, to secure the continued existence and well-being of its individual members. The first includes also all institutions of a public, and the second all those of a private nature. It is manifest, that not only the state itself and its institutions, but likewise the individuals who compose it, may be attacked from without as well as from within; and this both by the citizens of the same state, and by the citizens of other states. It is important, therefore, in the formation of a penal code, to consider how far the criminal laws of a state can and ought to be extended; to determine whether they should be made to apply beyond the local boundaries and personal jurisdiction of the state; and, if so, to decide upon and enumerate the persons and offences, to which they shall be so extended.

The direct and immediate operation of the criminal laws of a state must necessarily be confined within its own territorial boundaries; they can only be executed in certain cases, by the aid of other states in apprehending and delivering up the offenders to the authorities of the offended state; and the exercise of this comity on the part of a foreign state

may depend in some degree upon the aid afforded to the laws of such state by the authorities of other states. But as the degree and extent of the aid, which a state may be willing to afford in the execution of the criminal laws of other states, may depend somewhat upon the extent claimed by such state for its own laws,—inasmuch as a state may be supposed willing to aid in the execution of foreign laws, in the same manner and to the same extent, that it desires foreign aid in the execution of its own,—it is apparent, that the inquiry above stated is important also in an international point of view. If the subject be thus interesting, in reference to states which are wholly foreign to each other, its importance is greatly enhanced, in reference to the several states of the American union, by the provision inserted in the federal constitution, requiring that persons charged with crimes in any state, and escaping into another, should be delivered up to the authorities of the offended state. This provision makes that a matter of legal obligation between the several United States, which, between foreign states, is wholly a matter of international comity.

In order to determine the various questions involved in the general one above stated, it will be necessary, in the first place, to establish certain general principles, relating to the right of punishment,—the duty of exercising it,—and the power of the state to do so; and, in the second place, to apply these principles to the different classes of cases which may be supposed. It will then be proper, in the third place, to inquire and determine how far the results thus obtained in theory, as applicable in reference to states wholly foreign to each other, ought to be practically adopted in legislation, and also how far they ought to be modified, in reference to the states of this union, by the circumstance of their being united together by the constitution into one government, for certain purposes. It will then remain only to consider how the provisions, which it may be thought proper to adopt, shall be inserted in a code or other legislative act.

It is proper to remark, however, before entering upon this inquiry, that it is not necessarily, or, if at all, very remotely, complicated with any considerations of the abstract theory of the right of punishment; since, whatever theory may be adopted, the object of all systems of criminal law is still the same, the security of the state and its citizens; and the inquiry refers not to the offences which are to be made punishable, or to the kind or degree of punishment, but simply to the extent to be given to whatever system of penal law the legislative power may think proper to adopt.

The *first* principle, which we have occasion to settle, relates to the punitory right of the state, or rather perhaps to the extent of that right. The object of penal law, as already stated, being to secure the existence and well being of a state and its citizens, it is obvious that the punitory right of the state must be coextensive with that object; or, in other words, that the provisions of the penal code of any state may rightfully, (in theory, at least,) be extended to all attacks against the state itself or its citizens, wheresoever or by whomsoever committed.

The duty of the state, in regard to the matter of punishment, requires next to be considered. If it be the general duty of a state to procure for itself and its citizens the security above-mentioned; and, if it have the right to do so by punishing all attacks against itself or its citizens, by whomsoever or wheresoever committed; it is quite clear, that the exercise of this punitory right, ought to be limited only by the power of the state; and, consequently it may be laid down as the *second* principle, to be employed in this inquiry, that the penal code of a state ought to threaten with punishment all attacks, directed either against itself or its citizens, which it has or can obtain the power to punish.

It remains, *thirdly*, to consider the power of the state to punish. The state has the absolute and perfect control of all persons and things (except in reference to those persons

and things to which extritoriality is attributed,) within its own territorial limits; and, consequently, it has the power to punish for all offences committed within those limits, by whomsoever they may be committed. The state has also the absolute and perfect control of all persons who constitute its citizens, and as such owe it allegiance, and are bound to obey its laws. It consequently has the power to punish for all offences committed by its citizens, whether committed within its own territories, or elsewhere. In those cases, where an offence is committed or the offender is without the territory of the state, whose security is attacked, and the state has no control over the offender as a citizen, it can only obtain the power to punish him, through the aid of the foreign power, within whose territory he may happen to be; but, as it is to be presumed, that every state will be willing to lend its aid to every other, in the punishment of offenders, on the principle of international comity and good neighborhood, so far at least as to deliver up such offenders to be tried and judged by the laws which they have broken; it may be safely assumed, for the purpose of this inquiry, to be within the power of the state to punish all offenders against its laws, who are neither within its territory nor bound to it by their allegiance, because, by a proper application, it may always obtain the control of the persons of such offenders. This is peculiarly true, in reference to the several United States, by reason of the constitutional provision already referred to.

Having thus established the principles to be applied in this investigation, we have now to enumerate and classify the various combinations of cases, which may be supposed to occur, and to make the application accordingly. Those attacks, directed against a state or its citizens, which, when made punishable by law, are denominated crimes and offences, may be committed:

I. By CITIZENS; 1, *within the state*, (a) against the state

itself, (b) against citizens, (c) against foreign states, (d) against foreign citizens; 2, *without the state*, (a) against the state itself, (b) against citizens, (c) against a foreign state, (d) against foreign citizens;

II. By **FOREIGNERS**; 1, *within the state*, (a) against the state itself, (b) against citizens, (c) against foreign states, (d) against foreign citizens; 2, *without the state*, (a) against the state itself, (b) against citizens, (c) against foreign states, (d) against foreign citizens.

This classification embraces all the combinations of cases, which can possibly call for the exercise of the punitive power of a state, in any contingency or circumstances whatever. It will be sufficient for the present purpose to consider them under the four general divisions of offences committed by citizens and foreigners within and without the state.

I. *Of offences committed by citizens within the state.* According to the principles above established, all attacks by citizens against the state itself or its citizens, within the territory of the state, ought to be made punishable by its laws; since it is the duty of the state to protect itself and its citizens from such attacks, and it has perfect power to afford this protection, as the offenders are both territorially and personally under its control. But the citizens of a state may, also, while within its limits, be guilty of attacks upon foreign states or their citizens; and the question then arises, to what extent and in what manner, if at all, shall acts of this description be made punishable by the laws of the state within whose limits they are committed? It is clear, on the one hand, that they do not *directly* attack the state itself or its citizens; and they consequently cannot be put upon the same footing and made punishable in the same manner with similar acts against the state. On the other hand, the state is under no obligation, neither has it a right, to punish them as offences against the laws of the state attacked; the punitive right and duty of a state, as already established, being

limited to attacks against itself and its citizens. If acts of this description were offences against the laws of the state attacked, it would be the duty of the state of the offender to deliver him up for trial and punishment to the authorities of the offended state; but they cannot be considered as offences against the laws of the state attacked, for the reason, that, although such acts may be punishable by the laws of that state, yet to constitute them crimes, they must be committed by persons who are bound, for the time being at least, to obey those laws: and, consequently, to deliver a citizen to the state attacked by him, to be dealt with by such state, would be delivering him up to vengeance and not to legal punishment. The true character of the acts now under consideration seems to be, that they *indirectly* attack the state itself, of which he who commits them is a citizen, by tending to disturb the amicable relations subsisting between that state and the state attacked. (Vattel, B. ii, § 18). All attacks, therefore, by the citizens of one state, against a foreign state or its citizens, ought to be made punishable by the former, as substantive offences, so far as they have a tendency to disturb the friendly relations subsisting between the two states. It is only necessary to remark, further, that if the citizen of a foreign state be attacked in any manner, whilst within the state, of which the offender is a citizen, such foreigner being for the time entitled to the protection of the state, as a temporary citizen or subject, the offence is precisely the same as if committed against a citizen, and requires no special provision in order to become punishable as such.

II. *Of offences committed without the state by its citizens.* All acts, directed against the state or its citizens, by its citizens residing for the time out of its territorial limits, ought to be punishable by its laws, in the same manner, as if committed within the state; inasmuch as such acts are equally injurious to the security, which it is the object of penal laws

to guarantee; and they also fall within the punitory power of the state, because the offender, though not at the time within its territorial jurisdiction, is bound as a citizen owing it allegiance to obey its laws, and is therefore within its control. If such offender should refuse to obey the laws of his state, and submit himself to its jurisdiction, the state would be entitled to demand him of the state, within whose limits he might be; and the latter would then be bound, upon every principle of international comity, to deliver up the offender to the justice of his country. If the act done is also an offence against the laws of the state, within whose territory it is committed, and is there punishable with equal or greater severity,—if the offender is tried in that state, and either condemned and punished, or acquitted, such proceedings ought to preclude any further proceedings against him within his own state; but if the punishment be less than that inflicted by the state of the offender, or if the punishment to which the offender is condemned be remitted in whole or in part, the right of his state to try him still remains, and also to subject him to the measure of punishment inflicted by its own laws. It might seem, at first view, that if an offence were committed against the penal laws of two states, both would have the right of punishment, and that the infliction of it by one ought not to supersede its infliction by the other; but this view proceeds upon the mistaken notion, that the object of punishment is the satisfaction of the injured or offended party, rather than the security of the state and its citizens; whereas satisfaction of the injured party is vengeance and not punishment. But, notwithstanding the offender may be proceeded against by the state, within whose territory the offence was committed, and be there sentenced and punished, the state of which he is a citizen has still a right in strictness to punish him according to its own laws, if the punishment inflicted by the former state be not so severe as that threatened by the lat-



ter ; because the punishment inflicted by the offender's state is the only one, which, according to the laws of that state, is deemed adequate to the offence and sufficient to secure the object of punishment.

Offences committed by the citizens of a state, without its territorial limits, against a foreign state or its citizens, are, like acts of the same description committed within the state, indirect attacks upon the state, of which such offenders are citizens, and ought to be made punishable, in the same manner as substantive offences. If these offences are punishable by the laws of the state within which they are committed, their punishment by the state, of which the offender is a citizen, should be subject to the limitations already mentioned in regard to offences committed against a state or its citizens, without its territorial limits.

### *III. Of offences committed within the state by foreigners.*

Offences committed within the state by foreigners are not distinguishable from those committed by citizens, whether they are directed against the state itself, either directly or indirectly, or against its citizens. The right of the state to punish such foreigners is perfect ; inasmuch as during their residence within its limits, they are considered as citizens for the time being,—are entitled to and receive its protection,—and, as subject to a temporary allegiance, are bound to know and obey its laws. If a foreigner makes himself guilty of an indirect attack against the state, whose temporary citizen he is, by offences against the state of which he is a citizen, in such case, besides being made punishable and punished for the offence against the state in which he is resident, that state ought also to deliver him up, if demanded, to the state of which he is a citizen, to be judged and punished according to the laws of that state.

### *IV. Of offences committed without the state by foreigners.*

All offences, committed by foreigners, without the state, against the state itself or its citizens, come within the puni-

tory right of the state, inasmuch as they are attacks upon that security, which it is the object of penal laws to preserve, though they cannot perhaps in strictness be said to constitute offences against the laws of the offended state, inasmuch as the offenders are not bound to obey those laws. But though offences of this description are within the right of the state to punish, and may therefore be made punishable by its laws, yet the duty of punishment does not exist, except so far as the offender may be within the power of the state. If the offender has property or rights within the state, those may be confiscated or sequestered, in order to compel him to submit himself to its jurisdiction; or if he voluntarily comes within the state, he may be seized, and tried; but if the offender has no property within the state, or cannot be forced by a seizure of it to submit himself, or will not voluntarily come within the state, there is no longer any obligation on the state to punish him. The state may, it is true, demand him of the state whose citizen he is, but the latter is under no obligation to deliver him; the duty of that state in relation to such offences being merely to consider them as indirect attacks upon itself, as they tend to disturb the amicable relations subsisting between it and the state attacked, and to punish them accordingly. If the state of the offender unreasonably refuse either to deliver him up or to punish him, it makes itself a participator in the act, and may thereby expose itself to war.

In regard to offences committed by foreigners in foreign states, against such states or their citizens, no other state than that which is injured, or to which the offenders owe obedience, has the right of punishment, or is under any obligation to punish, except as a matter of international comity towards the states to whom the right and duty of punishment properly belong. The only obligation incumbent on a state, to which a foreign offender against foreign laws has fled, is to deliver him up to the authorities of the state

or states, to which punishment properly belongs. If this obligation cannot be performed, owing to the circumstances of the case, or the state is unwilling for any cause to perform it, there seems to be no objection to the subjection of the offender to trial and punishment in the state where he is ; but, in this case, it is said, that the offences must be of such a nature, that they are every where regarded as crimes. (Tittman, § 32.)

Though offences, committed without the state by foreigners, against foreign laws; cannot be considered generally in the light of crimes against the laws of any other than the offended states; yet, when persons, who have been guilty of such offences, come within another state to reside, it is perfectly competent for the latter state to subject them to police regulations and restrictions, in consequence of their having committed the offences in question.

The above are the theoretical results of an application of the principles relating to the right, the duty, and the power of punishment, to the various classes of cases, which may be supposed to exist, as between states strictly foreign to each other. The next branch of the general inquiry refers to the modifications, to which these results ought to be subjected, between states standing in the relation to each other of the several United States.

The several states, except in those respects in which they are united and bound together by the constitution, are to all intents as much foreign to each other, as they are to Canada or Mexico; but, by the adoption of the constitution, their individual existences were at least suspended, in reference to certain specified and enumerated objects, in regard to which they thenceforward constituted one state instead of several. One principal object of the constitution appears to be, to make the several states one as it respects all other states; and another to regulate their internal relations with each other.

In order to effect the general purposes of the constitution, congress has conferred upon it by that instrument, certain powers of civil and criminal jurisdiction,—relating to particular persons,—to particular subjects,—and to particular territory or districts.

The government of the United States, so far as respects the powers conferred upon it, is precisely coextensive in point of territory with the territory of the several states; and, within these territorial boundaries, which are also the territorial boundaries of the states, it exercises its criminal jurisdiction in reference to certain persons and subjects. But, within these same limits, the government of the United States possesses certain territory ceded to it by the several states, for the purposes of a seat of government, and for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, over which territory the power of exclusive legislation, in all cases whatsoever, is granted to congress. In addition to the territory of the latter description, the government of the United States possesses also the public lands ceded to it by the several states, which congress is authorized to dispose of, and in reference to which it is also empowered to make all needful rules and regulations.

In reference to persons and subjects, within the territorial jurisdiction of the states, congress is expressly authorized to provide for the punishment of counterfeiting the securities and current coin of the United States,—to define and punish piracy and felonies committed on the high seas, and offences against the law of nations;—and to make all laws (criminal, of course, included,) which shall be necessary and proper for carrying into effect the powers granted by the constitution.

Under these provisions, and in pursuance also of its general power of legislation, in regard to the territory immediately subject to the United States, congress has already defined and provided for the punishment of piracy and felony

on the high seas, and certain offences against the law of nations, and also enacted a general criminal code for the territories exclusively subject to its legislation. Under the head of offences against the law of nations, must be enumerated not only those specially denominated such by the writers on the common law, and which are made punishable by the statute of April 30, 1790, §§ 25, 26, but also those acts which are made punishable by the statutes of January 30, 1799, and April 20, 1818, on the ground of their tendency to disturb the relations of peace and good neighborhood subsisting between the United States and other nations.

It is manifest, that many of the acts, in reference to which, in accordance with the principles already established, it may be deemed expedient to extend the laws of the state beyond its territorial limits, are, or may be made punishable by the laws of the United States, in pursuance of the provisions above mentioned. The power to define and punish offences against the law of nations is broad enough to include within it all attacks against the international relations subsisting between the several states, as well as those subsisting between the United States as one nation and other nations. Although the powers conferred on congress are not perhaps exclusive, in every one of these respects, it will probably be most expedient to have but a single system of laws applicable to these subjects; and, therefore, such acts as are or may be made punishable by the laws of the United States should be excepted from the general extension to be given to the state laws.

The question now presents itself, how far the theoretical results of the above inquiry ought to be practically introduced into our legislation, with the exceptions resulting from the provisions of the constitution of the United States. In regard to offences, committed by citizens and also by foreigners within the state itself, there can be no question;

the only doubt is in regard to offences committed by citizens and foreigners out of the state, and within the territorial jurisdiction of some other state. The common law of England does not hold acts of this description to be offences; nor are such acts punished by the laws of that country, or by the laws of any state founded thereon, unless they are specially made so by some statute. But, on the continent of Europe, a different principle is established, at least, in those countries whose criminal law has been reduced into the form of a code. Thus, the criminal codes of France, Austria, Prussia, Bavaria, Saxony and Wurtemberg, and several projects of codes for other European states, all sanction the principle of punishing citizens for offences committed in a foreign country, and, in a greater or less degree, of punishing foreigners for offences against the state or its institutions, committed without its territorial limits. The Austrian code goes still further, and provides that foreigners shall be apprehended for all other offences, committed without the Austrian territory, and offered to be delivered up to the state, whose laws have been broken; and, if such offer be declined, the offenders are then to be punished according to the Austrian laws, with the addition of banishment, however, to the ordinary legal punishment.

The situation of the several United States, in regard to each other, and to the other states of this continent, more nearly resembles that of the different states of continental Europe towards one another, than that of the British empire towards other nations; and, so far as this similarity of situation goes, it furnishes one argument in favor of the adoption of the continental principle in this country. But the adoption of that principle need not be put upon the equivocal ground of example. It rests upon the more solid foundation of reason and justice. Indeed, it may be considered as absolutely true, that the criminal laws of a state ought to be obligatory on its citizens, wherever they may

chance to be, for the reason, that wherever a citizen may be, he claims and receives the protection of his country and its laws; and, though, whilst in a foreign country, he is subject, for the time being, to its laws, his conduct there must have a direct influence upon the relations subsisting between the state of his domicile and that of his temporary residence. For these reasons, it seems to be expedient to declare, in general terms, that the criminal laws of a state extend to and control the conduct of its citizens, whilst in a foreign state, whether such state be one of the United States, or a state wholly foreign.

In regard to offences committed by foreigners in foreign countries, it seems clear, for reasons already stated, that the state has the right, and ought as a matter of duty, to make them punishable, so far as they attack such state or its citizens, and to provide for their actual punishment, so far as the state may have power to inflict it, either by the voluntary coming of the offender within the state, or by means of confiscating or sequestering any property or rights, which he may have within the same.

There is one class of offences, embraced in the general inquiry, which, it is believed, has not as yet been made criminal by the laws of any state, namely, offences committed within the same, against the government, public institutions, or citizens of other states. The question, in regard to offences of this description, being not as to the extent to be given to the laws, by which they are made punishable, but whether they shall be made offences or not,—they do not fall within the scope of the present investigation.

To the general provision, extending the criminal laws to the acts of foreigners resident within the state, an exception should be made in favor of “ambassadors, other public ministers, and consuls,” in reference to “all cases affecting” whom, the constitution of the United States confers exclusive jurisdiction upon the judicial power of the union. Besides

these public officers, the attribute of extritoriality belongs also to foreign soldiers and other persons in the train of a hostile army, who are not subject to the criminal laws of a state, but only to that treatment which is sanctioned by the laws of war; and these also require to be excepted from the general provision.

It remains now only to consider how far it may be necessary to make an express declaration of the extent to be given to the criminal laws. It appears, from an examination of the cases and remarks in the books of the common law, to be established, that, in regard to crimes and offences which are such at the common law, they must be committed either actually or constructively within the territorial limits of the state; and, that, in regard to statute offences, if the acts thereby made criminal are intended to be made punishable, when committed without the territory, there must be an express declaration to that effect. It will be necessary, therefore, to declare expressly how far and to what cases and persons, the criminal laws are to be extended beyond the territorial limits of the state. L. S. C.

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ART. X.—LIVINGSTON'S PENAL CODES.

*A System of Penal Law for the State of Louisiana: consisting of a Code of Crimes and Punishments, a Code of Procedure, a Code of Evidence, a Code of Reform and Prison Discipline, a Book of Definitions. Prepared under the authority of a law of the said State. By EDWARD LIVINGSTON. To which are prefixed a preliminary Report on the plan of a Penal Code, and Introductory Reports to the several Codes embraced in the System of Penal Law. Published by James Kay, jr., and Brother, Philadelphia, and John I. Kay & Co., Pittsburg.*

THE volume, of which the above is the title, contains the whole of Mr. Livingston's works on Criminal Law, ex-



cuted in pursuance of an appointment for that purpose by the general assembly of the state of Louisiana.

In our 35th number, (p. 235), we gave an account of the legislation of Louisiana, so far as related to the formation and establishment of the codes, namely, the civil code and the code of procedure, which are in force in that state. Previous to the undertaking of those codes, in 1822, the general assembly had passed an act, February 10, 1820, providing for the appointment, by the senate and house of representatives then in session, of a person learned in the law, to prepare and present to the next general assembly "a code of criminal law, in both the French and English languages, designating all criminal offences punishable by law; defining the same in clear and explicit terms; designating the punishment to be inflicted on each; laying down the rules of evidence on trials; directing the whole mode of procedure; and pointing out the duties of the judicial and executive officers, in the performance of their functions under it." By the same statute, the sum of five hundred dollars was appropriated, to enable the person so to be chosen, "to procure such information and documents, relative to the operation of the improvements in criminal jurisprudence, particularly of the penitentiary system in the different states, as he may deem useful to report to the general assembly, in considering the project of a code." In the following year, namely, on the 13th February, 1821, Mr. Livingston was elected by joint ballot of the general assembly, to draw and prepare a criminal code; and, in March, 1822, he made a preliminary report, on the plan which he proposed to adopt, and stating the progress which he had made in the work, and the reasons which had prevented its completion. The general assembly thereupon passed a resolve, approving of the plan proposed, and earnestly soliciting Mr. Livingston to prosecute the work according to his report. Thus encouraged, Mr. Livingston

labored diligently in the preparation of the codes, which he had been directed to make; and, by assiduous labor, in little more than two years, after the plan had been approved, the work was completed. Scarcely was it reduced to writing, in the autumn of the year 1824, when the whole was destroyed by an accidental fire. This event was communicated to the next general assembly, which thereupon January 31, 1825,) passed a resolution, giving the author another year to renew his work, "which," says Mr. Livingston, "was to be done entirely from recollection, for not a written vestige of my former labor remained."

We have been unable, with the means at our command, to trace the history of Mr. Livingston's work any further; except, that, on the seventh of February, 1829, the general assembly passed an act allowing him the sum of forty-five hundred dollars, "for services rendered by him, in the compilation of a criminal code and code of evidence, leaving the subject of further compensation open for the future consideration of the legislature." The system of penal law was, at any rate, reported to the general assembly; but as its provisions were founded entirely upon a plan of reform and of prison discipline, the means of which did not then exist in Louisiana, the project was not adopted. This, as we have been informed, was the principal, if not the sole reason, why the system did not receive the legislative sanction of Louisiana. Mr. Livingston's plan for the prevention and punishment of crime comprehended a house of detention, a penitentiary, a school of reform, and a house of refuge and industry. In 1832, the general assembly authorized the erection of a penitentiary, which, we infer from the legislative proceedings in reference thereto, must have been completed on or before the month of March, 1835. Whether any of the other means of prevention and punishment, contemplated by Mr. Livingston, have been provided, we have no knowledge.

It is not our purpose to present our readers with a review or criticism of Mr. Livingston's system of a penal code for Louisiana. We have already given a historical sketch of its origin, progress and completion. It has never been adopted by the state, for which and to the credit of which, it was composed. But it has perhaps accomplished an equal amount of good for the world, as if it had received the legislative sanction of Louisiana; perhaps, indeed, if the people of that state were not then ready for its adoption, it may have served the cause of humanity even better, than if it had become their law; but, at all events, it has laid the foundation of an imperishable fame for its author. If Mr. Livingston has not been the lawgiver of the single state of Louisiana, he has embodied, combined and developed for the whole civilized world those improvements in criminal law which the age demanded, and for which the minds of many if not of all men were waiting, and to which a congress of humanity, if such a thing could be, would have given utterance. Wherever the law is studied as a science; wherever the cause of humanity has a votary; wherever liberty, civil and political, is an object of hope and of love; there will the name of Edward Livingston live in all honor; there will the spirit, which pervades his labors, continue to do its work, till the rights of humanity, acknowledged by all men, shall be firmly established on the twofold yet united basis of law and liberty.

Mr. Livingston's codes, though not clothed with the character of law, are a treasury of principles and provisions, from which many systems and codes have derived important improvements. The criminal laws of New York, Massachusetts, Georgia, and Illinois, which have been revised since the publication of the Louisiana project, are indebted to the labors of Mr. Livingston for very many useful and humane suggestions, which they have adopted to a greater or less extent.

The codes prepared by Mr. Livingston, for the state of Louisiana, have been adopted by the state of Guatemala, in South America; at least, we so infer, from a paragraph in the New Orleans Bulletin; in which it is stated, that the president of Guatemala, on receiving intelligence of the death of Mr. Livingston, from the *charge d'affaires* of the United States near that government, communicated the event to the legislature, in the following message, dated August 1, 1836:

"I have to announce to the representatives the melancholy intelligence of the death of Edward Livingston. The chief magistrate has received this sad news in the accompanying letter, from the *charge d'affaires* of the United States."

"Mr. Livingston was the author of the codes recently adopted by the assembly—codes worthy a free people. He honored us with his correspondence, and his death has sundered revered relations most beneficial to our country."

"We owe to him testimonials worthy an illustrious memory, and the government doubts not, that the chamber will decree them in such a manner, as will fulfil the obligations of our duty and our gratitude."

It remains to say a few words of the contents of the volume before us; which, however, it is almost needless to do, since they are very fully indicated in the title. The several works reprinted in this volume may be divided into two classes; *first*, the preliminary and introductory reports, and, *second*, the system of penal law. The reports consist of a preliminary report on the plan of a penal code, and an introductory report to each of the four codes, making in the whole three hundred and fifty-four pages. The last report is concluded in the following language.

"The code now submitted completes the system of Penal Law, which is respectfully offered for consideration.

"The task was undertaken with an unfeigned distrust of my own powers, which nothing could have conquered but the convic-

tion that a simple enumeration and development of the principles on which the system is founded, would force a conviction of their truth.

"It has been prosecuted with laborious and unremitting application for several years, with a respectful attention to the opinions of others, and a close observation of practical results.

"Its conclusion was attended with the gratifying consciousness of having taken every precaution to guard against the pride of opinion, and neglected no means that could be suggested by the deepest sense of its importance, and a religious desire that it might advance private happiness, by establishing the true principles of public justice.

"It is now respectfully offered for consideration, in the hope that after legislative wisdom shall have supplied the omissions, and corrected the errors of the work, it may be made the basis of a system, by which instruction may be promoted, idleness and vice repressed, crimes diminished, and the sum of human happiness increased."

The system of penal law, which fills the residue of the volume, and occupies about four hundred pages, comprises four distinct codes and a book of definitions, which are thus briefly described in the second chapter of the introductory title :

"The first, called the *Code of Crimes and Punishments*, is divided into two books, containing:—General Principles ; and the description of all acts or omissions that are declared to be offences with the punishment assigned to each.

"The second is called the *Code of Criminal Procedure*. It is divided into two books. It contains the means provided for preventing offences that are apprehended, and for repressing those that exist; and it directs the mode of proceeding for bringing offenders to justice.

"The third is the whole law of evidence, applicable as well to civil as to penal cases, and is called the *Code of Evidence*.

"The fourth contains a system of prison discipline, in all the stages in which imprisonment is used, either as the means of de-

tention or punishment. It is designated as the *Code of Reform and Prison Discipline*.

"The concluding division of the system is a *Book of Definitions*, which defines all the technical words or phrases that are used in the several codes."

It is not our present purpose, even if we had space, to enter upon the merit of Mr. Livingston's labors in the department of criminal justice, or to attempt a critical judgment of his character as a legislator or legislative reformer. In this respect, it is a remarkable fact, that his writings have attracted more attention in France and Germany, than they seem to have done in England and America; and in the former countries have been made the subject of elaborate and discriminating criticism, by the most distinguished criminal jurists. In order to form an impartial opinion of Mr. Livingston's merit as a lawgiver, we must know what judgment has been pronounced upon his works by these writers; and, with this view, we hope to be able hereafter to present our readers with some criticisms on his penal codes, extracted from foreign journals. L. S. C.

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#### ART. XI.—AMERICAN REPORTS AND REPORTERS.

[Supplement to ARTICLE V. in our last number.]

SINCE the publication of the article in our last number on American reports and reporters, several additional volumes of reports have been published; and we have also been supplied by the kindness and attention of our correspondents, with the means of making some corrections of and additions to the statements contained in that article.

*United States.* The honorable Ashur Ware, judge of the district court in Maine, has recently published a volume of his decisions, chiefly in matters of admiralty, in that court, from 1822 to 1839.\*

*Vermont.* Daniel Chipman published two volumes instead of one, as mentioned in our last number. The second,

however, is a very small and rare volume. The present reporter, Mr. Shaw, has also published a volume of reports, containing the cases since February term, 1837.

*Massachusetts.* Since our last, Mr. Pickering has published his twenty-first volume, including the cases to March term, 1839, in Suffolk and Nantucket. The eighteenth and nineteenth of this series are not yet published. We understand, that Mr. Pickering will close his labors as reporter, with an additional volume, making the twenty-second. We are now able to announce, and we do it with the greatest pleasure, that the vacancy occasioned by Mr. Pickering's resignation, has been filled by the appointment of our friend and contributor, Theron Metcalf, Esq., whose extraordinary qualifications for the office cannot fail to be acknowledged by every lawyer in the country. We venture to predict, that Mr. Metcalf's first volume will be the commencement of a new era in the preparation of reports in this country.

*South Carolina.* In our last, we omitted to mention that Mr. Hill published in 1837, two volumes of chancery reports, containing the cases in chancery from January, 1833, to May, 1837, both inclusive. Mr. Hill was succeeded by William Rice, the present state reporter, who has recently published his first volume.

*Tennessee.* We are indebted to the kindness of a correspondent, for the statute provisions of this state, and other information respecting the reporters and reports.

By an act of 1831, the legislature created the office of reporter of the decisions of the supreme court of the state; and thereby made it the reporter's duty to furnish the manuscript reports to the public printer, who was required to print five hundred copies; out of which the reporter was to furnish each circuit and supreme judge, each chancellor and each county court in the state, one copy, and to deposite twenty-five copies in the secretary's office for the use of the legislature—the residue were to be his own; and these,

together with the copyright of the book, constituted the reporter's compensation. Under this law, Mr. Yerger was appointed reporter—and reported the eight volumes mentioned in our last number.

On the reorganization of the government, under the new constitution in 1835, an act was passed providing for the appointment of an attorney general for the state, to hold his office for six years, and to receive a salary of one thousand dollars a year. It was made his duty among other things to report the decisions of the supreme court, under the rules, regulations, and restrictions prescribed by the act of 1831. It was provided that the clerks of the supreme court should furnish him copies of the original opinions delivered by the judges; that he should not report, at length, any case in which no other points of law should be decided, than such as had been settled in some other reported decision of the court; that he should, however, be governed by the direction of the court in determining what cases should be reported; that no more of the arguments of counsel should be reported than the positions taken, and the authorities cited and relied on; that immediately after the publication of each volume, the reporter should send and deliver to each clerk of the supreme court, the number thereof to which each of the three judicial divisions of the state is entitled, the expenses of the transportation to be paid by the state; and that the clerks of the supreme court should deliver to the clerks of the circuit courts, in their respective divisions, upon their application, the number of volumes published to which each county is entitled.

Under this law, Mr. Yerger, having been appointed the first attorney general of the state, by the legislature of 1835, reported the ninth and tenth volumes of his reports, which last volume brought the publication of the decisions of the court down to December term, 1837, at Nashville, inclusive.

Since Mr. Yerger's resignation, October 15, 1838, R. J. Meigs has held the office of attorney general and reporter.



He has published one volume of reports, containing the decisions of the court made at its terms in 1838, the last of which, the December term at Nashville, ended on the 10th of February last. The decisions of the subsequent terms we understand are now ready for publication.

*Illinois.* Since the publication of our last number, we have ascertained that by statute of January 19, 1829, § 9, the supreme court is required to "appoint some person learned in the law to minute down and make report of all the principal matters drawn out at length, with the opinion of the court in all such cases as may be tried before the said court, and the said reporter shall have a right to use the original written opinion after it shall have been recorded by the clerk."

By statute of February 14, 1831, the governor of the state was authorized to subscribe on behalf of the state for one hundred and fifty copies of Breese's reports, at three dollars a copy, and said statute further provides for the distribution of the copies so subscribed for. We understand that a volume of reports has been published since that of Mr. Breese, and that J. Young Scammon has recently been appointed reporter.

*Arkansas.* Since our last number, we have learned that two numbers of the first volume of reports of cases argued and determined in the supreme court of this state have been published by Albert Pike, reporter appointed by the court. They contain the cases decided at Little Rock, from June term, 1837, to July term, 1838, inclusive.

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The foregoing supplement completes, we believe, the sketch of American reports and reporters, which we undertook to give in our last number. In our next, we propose to present our readers with a similar sketch of the digests of American reports, and also of the different law periodicals, which have been published and are now publishing in this country.

G. G.

## JURISPRUDENCE.

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### I.—DIGEST OF ENGLISH CASES.

#### COMMON LAW.

Selections from 8 Carrington and Payne, Part 3 ; 4 Meeson and Welsby, Part 3 ; 7 Dowling's Practice Cases, Part 1 ; 5 Bingham's New Cases, Part 1 ; 1 Perry and Davison (in continuation of Neville and Perry) Part 1.

**AMENDMENT.** (*In criminal cases.*) A woman charged with the murder of her husband was described as "A., the wife of J. O., late of the parish of S., in the county of W., laborer." The judge, at the trial, ordered this to be amended by striking out the word "wife," and inserting the word "widow." *Reg. v. Orchard*, 8 C. & P. 565.

**ARBITRATION.** (*Award, finality of—Action for costs of reference.*) Where an action of debt, in which the defendant had pleaded the general issue and a set-off, was by consent referred to arbitration, "the costs of the reference and award *to abide the event*," and the arbitrator found that the plaintiff was not entitled to recover in the action, and had not any cause of action against the defendant; but said nothing as to the set-off: Held, that the award was final, and that the defendant was entitled to maintain an action for the costs of the reference and award. (2 C. & M. 722 ; 10 Bing. 508 ; 2 C. M. & R. 327.) *Duckworth v. Harrison*, 4 M. & W. 432 ; 7 D. P. C. 71.

2. (*Sufficiency of award by arbitrators and umpire.*) A cause was referred to two arbitrators, and such third person as they should nominate as an umpire, and the parties agreed to per-

form the award made "by the two and their umpire." The award having been made by the two arbitrators only, the court refused to grant an attachment for the non-performance of it. *Heatherington v. Robinson*, 7 D. P. C. 192.

**ASSAULT.** (*Indictment for inflicting an injury dangerous to life, under the 1 Vict. c. 85, s. 2.*) On an indictment upon the stat. 1 Vict. c. 85, s. 2, for the capital offence of inflicting an injury dangerous to life, with intent to murder, the jury ought not to convict unless they are satisfied that the prisoner had in his mind a positive intention to murder: and it is not sufficient that it would have been murder if death had ensued.

And if A. is charged with this offence, and B. is charged with aiding and abetting him, it is essential, in order to make out the charge against B., that he should have been aware of A.'s intention to commit murder.

An indictment on this statute stated that the prisoner feloniously and of his malice aforethought did assault C. H., and did cause unto C. H. "a certain bodily injury dangerous to the life of her the said C. H., by then and there feloniously with his hands and fists striking and beating the said C. H. in and upon the head and back, &c. &c. [setting forth specifically the means by which the assault was committed, but not specifying the nature of the bodily injury occasioned by them]: Held, sufficient. *Reg. v. Cruse*, 8 C. & P. 541.

2. The offence of carnally knowing and abusing a female child under ten years old, (with her consent) is not a felony which includes an assault within the statute, 1 Vict. c. 85, s. 11, even though it was stated in the indictment for the felony that the prisoner made an assault upon the child. To support a charge of assault, such an assault must be shewn as could not be justified in an action under a plea of leave and license. *Reg. v. Banks*, 8 C. & P. 574; *Reg. v. Meredith*, id. 589.
3. A party was indicted for robbery with violence, under the stat. 1 Vict. c. 87, s. 3. The jury found the prisoner "guilty of an assault, but without any intention to commit any felony:" Held, that such special finding did not take the case out of the

operation of the stat. 1 Vict. c. 85, s. 11, for that the "crime charged" there mentioned means the charge as stated in the indictment. *Reg. v. Ellis*, 8 C. & P. 654.

Held, that a person who puts a deleterious drug into a liquid in order that it may be taken by another, if it be taken, is guilty at common law of an assault on the party who takes it. *Reg. v. Button*, 8 C. & P. 660.

ATTORNEY. (*Privileged communication to.*) A., an attorney, was employed by B. to put out money on mortgage. C. applied to A. to procure him an advance of money on mortgage, and to act as his attorney in procuring it. C. stated to A. that he was the owner of certain freehold lands, and produced a forged will in proof of his title, which he placed in A.'s hands. B. advanced the money on this supposed security, A. acting as his attorney by preparing the mortgage deeds, &c. On the trial of C. for uttering the forged will: Held, that A. was bound to produce the will, and also to give evidence of what C. said to him as to the advance of the money. (See *R. v. Smith*, 1 Phill. Ev., ch. 6, contra.) *Reg. v. Avery*, 8 C. & P. 596.

BILLS AND NOTES. (*Alteration of bill after acceptance—Pleadings—Admission by acceptor, effect of.*) In an action by indorsee against acceptor of a bill (not stated to be payable at any particular place,) it is a good defence, under a plea that the defendant did not accept the bill declared on, that after he had accepted it generally, it was altered without his knowledge, by the addition of a memorandum making it payable at a banker's. (2 C. & M. 151; 2 C. M. & R. 291.)

The acceptor of a bill, on application to him for payment, answered that the bill had been altered as to the acceptance, by being made payable at a particular place; that he never made it payable there, nor elsewhere than at his own house, and that he should take such steps as the law would authorize on the subject; that he had been prepared for payment, and the party might have the money by calling at his house. Held, that this letter was no acknowledgment of a subsisting debt so as to support a count on an account stated. (5 M. & Sel. 65; 5 B. & Cr. 360.) *Calvert v. Baker*, 4 M. & W. 417; 7 D. P. C. 17.

2. (*Action for amount of bill paid under misrepresentation—*

*When necessary to tender back bill before action brought.*) The defendant supplied the plaintiff with goods to the amount of 71*l.*; the plaintiff authorized M. to pay that sum to the defendant. M. paid the defendant 50*l.* and applied the remaining 21*l.* to his own use. M. also owed the defendant 24*l.*, and the defendant drew a bill on him for 45*l.*, the amount of these two sums, which he accepted, but which was dishonored when due, and M. subsequently became bankrupt. The defendant applied to the plaintiff for payment of the amount of the bill, representing that it had all been left unpaid on the plaintiff's account by M.; and the plaintiff, on such representation, paid the defendant the £45 and received back the bill. In an action to recover back the balance of £24, as having been paid on a misrepresentation of the facts; Held, that the plaintiff was not bound to prove that he tendered back the bill to the defendant before action brought. *Pope v. Wray*, 4 M. & W. 451.

CHARTER-PARTY. (*Reckoning of running days—Pleading.*)

Under a charter-party to load coals and iron at Cardiff, and to proceed with them to Alexandria, the running days to commence on the 16th December, 1834; the plaintiff having with the defendant's consent laden the coals at Pembroke in ten days ensuing the 16th of December, and not having sailed for Cardiff till the 27th; held, that the running days were still to be reckoned from the 16th of December; and that proof of the defendant's consent satisfied an allegation in the declaration, that the coals had been laden at Pembroke at his request. *Jackson v. Galloway*, 5 Bing. N. C. 71.

2. (*Evidence of usage of trade.*) On a charter-party engaging to pay £6 15*s.* per ton for goods shipped at Bombay for London, cotton to be calculated at 50 cubic feet per ton: Held, that evidence was admissible for the defendant of a usage in the trade to pay according to the measurement taken at Bombay, before the goods are loaded; and that the plaintiff was entitled to show in reply, that his captain objected to receive the goods at the Bombay measurement, measured them when on board,

and delivered an account of that measurement to the shippers. (7 Bing. 587; 1 M. & W. 343; 3 B. & Ad. 728; 2 C. & P. 525; 2 Moore, 224.) *Bottomley v. Forbes*, 5 Bing. N. C. 121.

**DEVISE.** (*To executors—Power or interest.*) Devise of lands to E. H. for life, “and after her death my will is that my said freehold shall be sold by my executors in trust:—Held, not to give the fee to the executors, but only a power. *Doe d. Hampton v. Shotter*, 1 P. & D. 124.

**EMBEZZLEMENT.** A person cannot be convicted of embezzlement as the clerk or servant of a society which is an unlawful combination and confederacy, by reason of administering an unlawful oath to its members. *Reg. v. Hunt*, 8 C. & P. 642.

**EVIDENCE.** (*In case of pedigree.*) On a question of pedigree, an entry in the books of the Merchant Taylors’ Company, that T. C. was admitted a freeman of the Company by the description of “T. C. of S. street, son of J. C. deceased,” is admissible in evidence to prove not only the fact that T. C. was admitted a freeman, but that the Company received him by that description. Entries of admission to the freedom of the city of London are evidence in like manner. *Collins v. Maule*, 8 C. & P. 502.

2. (*Entries against interest.*) It is no objection to the admissibility of an entry in an account by a deceased steward, charging himself, that the balance on the whole account is in his favor. *Williams v. Geaves*, 8 C. & P. 592.

**EVIDENCE IN CRIMINAL CASES.** (*Statement of prisoner before magistrate.*) Where, on the examination of persons charged with felony before a magistrate, the magistrate’s clerk, in taking down the prisoner’s statement, had left a blank where either of the prisoners had mentioned the name of another of them, the judge at the trial would not allow those blanks to be supplied by parol evidence. *Reg. v. Morse*, 8 C. & P. 605.

2. (*Of statement before coroner.*) Where a witness, on an indictment for murder, was asked whether she had not before stated that the deceased was intoxicated when he received the blows, and answered that she had not “except before the coroner,”

this is not evidence, and the judge will not refer to the depositions for the purpose of making it so. *Reg. v. Holden*, 8 C. & P. 606.

**EXECUTOR AND ADMINISTRATOR.** (*Chargeability as executor de son tort.*) Where a party receives a debt due to the estate of a person deceased, for the purpose of providing the funeral, he will not thereby become chargeable as executor *de son tort*, unless he receives a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased, which is a question for the jury. *Camden v. Fletcher*, 4 M. & W. 378.

**FORGERY.** (*Uttering—Intent to defraud.*) A conditional uttering of a forged instrument is as much a crime as any other uttering. Therefore, where the prisoner gave a forged acceptance, knowing it to be such, to the manager of a banking company, with whom he had an account, saying that "he hoped this bill would satisfy the bank as a security for the money he owed;" and the manager replied, that that would depend on the result of inquiries respecting the acceptors: Held, a sufficient uttering.

If a party, when he utters a forged instrument, knows that it is forged, and means it to be received as a genuine instrument, the intent to defraud is necessarily to be inferred. (8 C. & P. 274.) *Reg. v. Cooke*, 8 C. & P. 583.

**FRAUDULENT REPRESENTATION.** (*When actionable, and by whom.*) The defendant being about to sell a public house, falsely represented to A., who had agreed to purchase it, that the receipts were £180 a month; A. having, to the defendant's knowledge, communicated this representation to the plaintiff, who became the purchaser instead of A.: Held, that an action lay against the defendant at the suit of the plaintiff. (2 M. & W. 519; 3 T. R. 51; 1 Stark. N. P. C. 434.) *Pilmore v. Hood*, 5 Bing N. C. 97; 7 D. P. C. 136.

**HUSBAND AND WIFE.** (*Law as to coercion of wife.*) *Quære*, whether, where husband and wife jointly commit the offence of inflicting a bodily injury dangerous to life, with intent to murder,

within the stat. 1 Vict. c. 85, s. 2, the wife is entitled to the legal presumption of her having acted under coercion. But she is clearly not entitled to be acquitted on this ground at the end of the case for the prosecution, since, if the jury find a verdict for an assault only, under the 1 Vict. c. 85, s. 11, she is punishable as well as the husband. *Reg. v. Cruse*, 8 C. & P. 541.

2. (*Joint indictment against.*) Where, on the trial of a man and woman for larceny, it appears by the evidence that they addressed each other as husband and wife, and passed and appeared as such, and were so spoken of by the witnesses for the prosecution, it will be for the jury to say whether they are satisfied that they are in fact husband and wife, even though the woman pleaded to the indictment which described her as a *single woman*. In such a case a female prisoner ought not to be indicted as a single woman. *Reg. v. Woodward*, 8 C. & P. 561.

**INSURANCE.** (*Duty of insurance broker.*) On an undertaking to effect an insurance according to special instructions, a part of the duty implied is the giving notice to the employer in case of failure; and therefore an actual promise to that effect, although averred in the declaration, need not be proved. (2 T. R. 186.) *Callender v. Oelrichs*, 5 Bing. N. C. 58.

**JURY.** (*Mis-trial—Challenge of juror.*) After a special jury had been sworn on the trial of an indictment for a misdemeanor, it was discovered that one of them had sat on the grand jury who found the bill. It was proposed that he should leave the box, but the defendants objected to this course; the trial proceeded, and the defendants were convicted. The court refused to grant a rule for a new trial, on the ground of mis-trial. *Reg. v. Sullivan*, 1 P. & D. 96.

**LARCENY.** (*By servant.*) A cattle drover was employed by a grazier in the country to drive eight oxen to London, with instructions, that if he could sell them on the road, he might; and those he did not sell on the road he was to take to a particular salesman in Smithfield market, who was to sell them for the grazier. The drover sold two on the road, but instead of taking



the other six to the salesman, drove them himself to Smithfield market, and there sold them, and received the money, and applied it to his own use ; Held, that he could not be convicted of either larceny or embezzlement. *Reg. v. Goodbody*, 8 C. & P. 665.

**LUNATIC.** It seems that the wife of a lunatic who has no committee has a sufficient implied authority to sue in the name of the lunatic for debts due to him. *Rock v. Slade*, 7 D. P. C. 22.

**MANDAMUS.** It is no ground of objection to a mandamus that a requisition is made on parties in the alternative to do one of three things, if the duty enjoined by act of parliament forms one of them, and there has been a general refusal to comply with such requisition. *Reg. v. St. Margaret's, Leicester*, 1 P. & D. 116.

**MURDER.** A., who was insane, collected a number of persons together, who armed themselves with a common purpose of resisting the lawfully constituted authorities, A. having declared that he would cut down any constables who came against him. A. in the presence of others of his party, afterwards shot a constable who came with a warrant to apprehend him : Held, that the others were guilty of murder as principals in the first degree, and that any apprehension they had of personal danger to themselves from A. was no ground of defence for remaining with him after he had so declared his purpose. *Reg. v. Tyler*, 8 C. & P. 616.

**PARTNERSHIP.** (*Authority by retired partner to continuing partner to indorse bills, how proved.*) A retired partner may give authority by parol to a continuing partner to indorse bills in the partnership name, after the dissolution of the partnership.

And where the retired partner stated that he left the assets and securities of the firm in the hands of the continuing partner, for the purpose of winding up the concern, and that he had no objection to his using the partnership name : Held, that the jury were justified in finding that the continuing partner had authority to indorse promissory notes, so left in his hands, in the partnership name. *Smith v. Winter*, 4 M. & W. 454.

**PLEDGE.** W., captain of a ship, pledged his chronometer, then in the possession of the maker, to the defendants, the owners of the ship, in consideration of their advancing him £50 and allowing him the use of the instrument, on a voyage on which he was about to sail. After the voyage he placed it at the maker's, and then pledged it to the plaintiff, for whom the maker being ignorant of the pledge to the defendants, agreed to hold it. The money advanced by the defendants not having been repaid: Held, (in an issue under the interpleader act) that the property in the instrument was in the defendants. *Reeves v. Capper*, 5 Bing. N. C. 136.

**PRACTICE, IN CRIMINAL CASES.** (*Admissions in.*) On the trial of an indictment for perjury, on the crown side of the assizes, where it appeared that the attorneys on both sides had agreed that the formal proofs should be dispensed with, and that that part of the prosecutor's case should be admitted; the judge would not allow this admission, holding that a criminal case could not be tried on admission unless made at the trial by the defendant or his counsel. *Reg. v. Thornhill*, 8 C. & P. 575.

**PRINCIPAL AND SURETY.** (*Surety, when discharged by fraud.*) The plaintiffs advanced £2600 to C. on the security of a mortgage executed by C., and of a promissory note for £2600 in which the defendant joined as a surety. At the time of this advance C. owed the plaintiffs £800, which was deducted from the £2600; but the recital of the mortgage deed, which was read by the plaintiff's agent in the presence of the defendant, stated, untruly, that the £800 had been repaid: Held, that this was a fraud in law, which released the defendant from his liability on the note. *Stone v. Compton*, 5 Bing. N. C. 142.

2. (*Discharge of surety by time given to principal.*) A. indorsed to S. & Co., as a security for advances made by them to him, certain promissory notes made by B. While the notes were running A. stopped payment, and a deed was executed by him and several of his creditors, and among them by S. & Co.,

whereby his affairs were placed in the hands of inspectors, and the creditors, parties to the deed, agreed on certain terms not to call for or compel payment of the debts due from him for three years. After the execution of this deed by A. and S. & Co., and before the notes became due, B. signed a written consent to the creditors' signing the deed, and giving time to A., without prejudice to their claims on her, B. : Held, that her liability on the notes to S. & Co. was thereby revived. (2 Swanst. 185.) *Smith v. Winter*, 4 M. & W. 454.

**ROBBERY.** (*By threat of accusation.*) Where the prisoner, in order to obtain money, said to the prosecutor, "if you do not assist me, I will say you *took indecent liberties* with me some time ago:" Held, not sufficient to sustain a count charging that he threatened to accuse the prosecutor of having attempted and endeavored to commit with him the abominable crime, &c.

Since the stat. 1 Vict. c. 87, s. 4, where money is obtained by any of the threats to accuse therein specified, the indictment must be on the statute and not for robbery; but when it is obtained by threats to accuse other than those specified in the statute, the indictment may be for robbery, if the party was put in fear, and parted with his money in consequence. *Reg. v. Norton*, 8 C. & P. 671.

**SETTLEMENT.** (*By apprenticeship—What is service under the indenture.*) A pauper having been bound by indenture to a carpenter, met with an accident, and became unable to work; he was in consequence taken home to his father's parish by his master, for the benefit of a surgeon's attendance, whom the master promised to pay, but did not; and the pauper slept at his father's for more than forty days, at the end of which time the indenture was cancelled. During this period the master called upon the pauper, and asked him to carry out and sell lottery tickets, on which he was to receive 1s. a ticket, the prizes being articles manufactured by the master in his trade: Held, that such service was connected with the apprenticeship, and that a settlement was therefore gained by the forty days' residence in the father's parish, although the selling of the

lottery tickets might be an illegal employment. (4 B. & Cr. 64; 11 East, 176; 3 B. & Ad. 706.) *Reg. v. Sowerby*, 1 P. & D. 180.

**SHIPPING.** (*Liability of owners for negligence in management of ship under charter.*) A steam vessel was under charter-party for six months, the owners to keep it in order for the conveyance of goods, &c. from Newcastle and Goole, or such other coasting station as the charterer might from time to time employ it in. The crew were appointed by the owners, but paid by the charterer, who also was to pay all disbursements. The charterer did not interfere with the navigation of the vessel, but while he was on board, through the negligence of the crew, it ran against and injured the plaintiff's keel: Held, on action against the owners, that they were liable for the injury. *Fenton v. Dublin Steam Packet Company*, 1 P. & D. 103.

**SLANDER.** A demurrer to a declaration in slander does not admit the words to have been spoken with the intent attributed to them by the innuendo. *Wheeler v. Haynes*, 1 P. & D. 55.

**TENDER.** If a party, in tendering a sum of money, say, "I tender you £21 in payment of the half year's rent due at Lady day last," this will make the tender bad, because, by accepting the money, the other party would admit that that sum was the amount of half a year's rent.

A good tender cannot be made in terms, which, by taking the money, would cause the other party to make an admission. *Marquis of Hastings v. Thorley*, 8 C. & P. 573.

**WARRANTY.** (*Implied warranty by manufacturer and seller of goods.*) The defendant sent to the plaintiff, the patentee of an invention known as "Chanter's smoke-consuming furnace," the following written order:—"Send me your patent hopper and apparatus, to fit up my brewery copper with your smoke-consuming furnace. Patent right £15 15s.; iron-work not to exceed £5 5s.; engineer's time fixing 7s. 6d. per day." The plaintiff accordingly put up on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purposes of a brewery, and was returned to the plaintiff:

Held (no fraud being imputed to the plaintiff) that there was not an implied warranty on his part that the furnace supplied should be fit for the purpose of a brewery; but that the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the whole £15 15s., the price of the patent right. (5 Bingham 583; 4 B. & Cr. 108.) *Chanter v. Hopkins*, 4 M. & W. 399.

**WITNESS.** (*Examination of witness on interrogatories.*) The court will not grant a rule to examine a witness on interrogatories on the ground of infirmity, age, or illness; unless the affidavit of a surgeon be produced, stating the nature of the incapacity, and alleging his belief that the witness will not be able to attend the trial of the cause. *Davies v. Lowndes*, 7 D. P. C. 101.

2. (*Objection to competency, how to be taken.*) A party cannot give evidence to shew the incompetency of a witness called for the opposite party, without having taken the objection on the voir dire. *Dewdney v. Palmer*, 7 D. P. C. 177.
3. (*Competency.*) In an action on a charter-party, a person who is a partner with the plaintiffs in the ship, though not one of the registered owners, is not a competent witness for the plaintiffs, unless cross releases are executed between him and them. *Jackson v. Galloway*, 8 C. & P. 480.
4. (*Same.*) In an action by assignees of a bankrupt for money had and received, against a sheriff who has sold the goods of the bankrupt under an execution, and paid over the proceeds after notice of an alleged act of bankruptcy, the sheriff's officer who acted in the execution, if he has given the usual indemnity bond to the sheriff, is not a competent witness for the defendant, under the stat. 3 & 4 Will. 4, c. 42, s. 26. *Groom v. Bradley*, 8 C. & P. 500.
5. (*Same.*) A plaintiff claimed, as occupier of a house, to be entitled to the use of water from a certain watering place. Her sister, who was called as a witness in support of the right, stated on the voir dire that she had been a joint owner in fee with the plaintiff of the house in respect of which the right was claimed,

and had conveyed her share to the plaintiff with the usual covenants for title. Held, that she was not a competent witness, and that indorsing her name on the record, under the stat. 3 & 4 Will. 4. c. 42, s. 27, would not render her competent. *Steers v. Carwardine*, 8 C. & P. 570.

**WOUNDING.** To constitute a wound, there must be a separation of the whole skin; a separation of the cuticle only is not sufficient. *Reg. v. M<sup>r</sup> Loughlin*, 8 C. & P. 635.

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EQUITY.

Selections from 8 Simons, Part 3.

**AUDITOR.** (*Appointment by will.*) Testator by will appointed the plaintiff to be auditor of the accounts of his estate, during the execution of the trusts of the will, with a proper salary, and in case he should become incapable or unwilling to act, testator directed his trustees to appoint another auditor of a certain description and with like remuneration. Held, that the trustees could not remove the plaintiff from his auditorship, without proof of incapacity or neglect, and that he was entitled to receive an adequate salary, to be fixed by the master. *Williams v. Corbet*, 8 Sim. 349.

**DEMONSTRATIVE LEGACY.** A gift of an annuity for the life of the donee, payable out of the testator's long annuities, and which he afterwards directed to be secured on his stock of long annuities: Held to be a general legacy, with a specific fund pointed out for its payment, and a sufficient portion of long annuities was directed to be sold out to answer the annuity. *Fryar v. Butter*, 8 Sim. 442.

**FOREIGN CONTRACT.** (*Domicile—Construction—Satisfaction.*) A., a domiciled Englishman, married a lady at the Mauritius, where the French law was in force. By their settlement, which was in the French language and form, they declared, that they intended to marry according to the laws of

England, the benefit of which they reserved to themselves the power of claiming : and it was stipulated that the sum of £4000, which A. acknowledged by the settlement that he had received from his wife, should be invested for her benefit, and the income paid to her with a proviso, that, if at the time of the husband's decease such investment had not been made, the wife should be at liberty to take the sum out of his assets. A., in fact, never received the £4000, the acknowledgment by him being merely the usual form of creating an obligation by the French law. Held, upon the death of A. intestate, that the widow was entitled to have the £4000, paid out of his assets, and also to receive her distributive share of the residue. *Lang v. Lang*, 8 Sim. 451.

**INFANT.** (*Maintenance.*) An infant's share of a residue, amounting to £125, was on the joint petition of the infant and his father ordered to be paid to the latter, to reimburse him for the expenses of his son's outfit and passage to India, which he had borrowed money to defray. *Clay v. Pennington*, 8 Sim. 359.

**LETTERS-PATENT.** (*Construction, extent of grant.*) The island of Cape Breton, which is separated by a very narrow strait from Nova Scotia, was originally, and up to the year 1784, considered as forming together with it one colony. In that year it was for the purposes of government made a distinct province, and was subject to a separate governor and council of its own until 1820, when it was reunited to Nova Scotia by the name of the country of Cape Breton. In 1788, while the separation continued, the duke of York applied for a grant of mines in Nova Scotia ; and it appeared in evidence, that it was the intention of Geo. 3 to have made such a grant, subject to certain reservations (which were not settled at the time), but this intention was never carried into effect. After the death of Geo. 3, and after that Cape Breton had been reunited to Nova Scotia, the duke of York renewed his application, founding it upon the intention of the late king, and upon that ground expressly the lords of the treasury, by two several minutes, recommended Geo. 4, to

make a grant to the duke of York of all mines in the province of Nova Scotia, upon certain terms, which they requested the chancellor of the exchequer to submit to the duke of York. In the first of these treasury minutes, Cape Breton was spoken of as distinct from Nova Scotia, and it was with reference to Nova Scotia so described that they mentioned the intention of Geo. 3. Letters-patent were afterwards made, by which Geo. 4, of his especial grace, certain knowledge, and mere motion, granted to the duke of York, upon certain terms, all mines in the *province* of Nova Scotia. Held that this description included Cape Breton, and that the clear meaning of the letters-patent was not to be controlled by the ambiguous language of the treasury minutes, more particularly as the terms recommended by the lords of the treasury had been altered in one other important particular, namely, by the substitution of 60 years for 36, as the period of the grant. *Taylor v. Attorney-General*, 8 Sim. 413.

**PARLIAMENTARY AGENT.** (*Privilege from arrest.*) A parliamentary agent on his return from the house of lords, where he had been attending an appeal, was arrested upon an attachment for the costs of a chancery suit. Held that he was entitled, although he had not returned by the shortest road, and had stopped for refreshment, to be discharged, and that he might apply for that purpose, either to the court out of which process had issued, or to that on which he was attending when arrested. *Att.-Gen. v. Skinner's Comp.; Ex parte Watkins*, 8 Sim. 376; and Coop. 1.

**PRE-EMPTION.** (*Laches.*) A testator devised a house to trustees upon trust to permit his son, at any time within three months after his decease, to become the purchaser thereof, at a certain price, and to convey the same accordingly; but should the son not complete the purchase within three months, then the trustees were to sell the same by auction within twelve months of the testator's death. The son, who was himself a trustee, within two months declared verbally to his co-trustees his intention to purchase, but the trustees did not deliver the title-deeds to the solicitor who was to prepare the conveyance until the last



day of the three months, and no conveyance was made, nor was any part of the purchase money paid within the three months. Held, that the right of pre-emption was lost. *Dawson v. Dawson*, 8 Sim. 346.

**STATUTE OF LIMITATIONS.** (*Mercantile accounts.*) Where the bill stated that five persons who were joint owners of an estate in Java, and were as such indebted to the plaintiffs, a mercantile firm in Bombay, for moneys paid by the firm on their account and for their use as proprietors; and that subsequently, in pursuance of an arrangement by which the debt was divided among the proprietors, the defendant was debited with his proportion, and that afterwards divers sums had been received by the firm on his account, and that such an account was still open and unsettled: Held, that this was not upon the face of it a mercantile account within the exception of the statute of limitations. *Forbes v. Skelton*, 8 Sim. 335.

**USURY.** (*Purchase of rent charges.*) Two rent charges of £21 each, secured upon and issuing out of leasehold property, were, as the deeds expressed, granted for 40 years in consideration of £400. There was evidence to show, which was taken to be true by the court, that the original application was for a loan. Held, that the transaction was usurious, it being clear that the aggregate payments on the rent charge would greatly exceed the £400 with interest thereon at five per cent. for forty years. *Ferguson v. Sprang*, 3 Nev. & Man. 665, commented on. *Chillingworth v. Chillingworth*, 8 Sim. 404.

**WILL.** (*Construction, substitution, presumption of death.*) Testator, by will dated 1828, bequeathed a fifth of his residuary estate to W. R., E. R., and J. R., and all other the children of J. R. the elder, and the issue of such of his children as should have departed this life, such issue to take the share which their parent would have taken if living. One of the children of J. R., not named in the will, had gone abroad in 1809, and had not been heard of since 1815. Held by the court that he must be presumed to have died before the date of the will, and that his children were entitled to the share which he would have taken if living. *Rust v. Baker*, 8 Sim. 443; Coop. 172.

## II.—DIGEST OF AMERICAN CASES.

Selections from 1 Rice's (South Carolina) Reports ; 4 Missouri Reports ; and 19 Wendell's (New York) Reports.

**ACTIONS IN GENERAL.** (*Several causes of action from same source.*) Where a party hath several demands or existing causes of action growing out of the same contract or resting in matter of account which may be joined and sued for in the same action, they must be joined ; and if the demands or causes of action be split up and a suit brought for part only, and subsequently a second suit for the residue, the first action may be pleaded in abatement or in bar of the second action. *Ben-dernagle v. Cocks*, 19 Wend. 207.

**ADMISSIONS.** (*Receipt of money.*) Where a creditor admitted the receipt of money from his debtor, but stated it to be a loan, the admission taken together does not amount to proof of payment. *Oldham v. Henderson*, 4 Missouri, 295.

**AGREEMENT.** (*Capacity.*) The old rule was, that a party could not stultify himself ; but it is now subject to many modifications, and it may now generally be stated, that if a party sought to be charged with a contract, can show that he was so devoid of capacity as to be utterly incapable of understanding it, he is not bound by it. *McCreight v. Aiken*, 1 Rice, 56.

**ARBITRATION.** (*Joint and individual demands.*) A submission by two parties on one side, and one on the other, includes not only the joint demands of the two, but their individual demands against the opposite party ; and if an award be made in pursuance of it, such award may be pleaded in bar to an action by one of the joint obligors against the other party. *Fidler v. Cooper*, 19 Wend. 285.

**ASSIGNMENT.** (*Voluntary.*) An assignment of the whole estate and effects of a debtor for the benefit of his creditors generally, though upon trusts, preferring in the order of payment one creditor to another, has been recognised in South Carolina as valid and binding. (*S. P. Niolin v. Douglass and another*,

2 Hill. Ch. R., 443, 446.) *Smith, Wright & Co. v. C. C. Campbell & Co.*, 1 Rice, 352.

2. (*Judgment against maker of note as garnishee.*) A having given his note to B, was summoned as a garnishee in a suit against B, and a recovery was had. In an action by C, to whom B had assigned the note (before the attachment) against A, the record of the recovery against him as garnishee, is a good bar to the action.

Nor will it matter that C has exchanged the note for four other smaller notes, amounting to the same sum, and for the same consideration. *Wolf v. Cozzens*, 4 Missouri, 431.

ASSUMPSIT. (*By guardian.*) In an action of assumpsit by plaintiff as the guardian of two infants his wards, the counts in his declaration stated in substance that the defendant had received the money of the infants, and in consideration thereof had promised to pay the plaintiff, their guardian. Held, that the plaintiff could only entitle himself to recover by showing, 1st, his guardianship; 2d, the receipt of the money by the defendant; and 3d, an express promise to pay the money to him, as guardian. *Brooks ads. Sullivan*, 1 Rice, 41.

2. (*Same.*) Where money has been received by another belonging to an infant, the promise to pay which the law implies on the part of the receiver, is implied to the infant, and not to the guardian of such infant. *Ib.*

3. (*Not barred by verdict in trover.*) In an action of assumpsit for the price of two negro slaves, alleged to have been sold by the plaintiff to the defendant, it appeared that the plaintiff had previously to the bringing of this suit brought an action of trover against the defendant for the same negroes, in which the jury had found a verdict for the defendant. The sale upon which the plaintiff relied in this case appeared to have been made before the action of trover was commenced. Held, that the former recovery in trover by the defendant was no bar to this action, and the jury having found for the plaintiff, the court refused to grant a new trial. (*Earle & Butler, J. dissenting.*) *Robertson v. Montgomery*, 1 Rice, 87.

4. (*Against father of illegitimate child.*) An action of assumpsit for the support and maintenance of an illegitimate child, does not lie against the reputed father, notwithstanding the existence of an order of filiation and for maintenance, except upon a promise either express or implied. *Moncrief v. Ely*, 19 Wend. 405.
5. (*Same adoption.*) Where the *putative father* adopts the child, whilst such adoption continues, a promise may be implied in favor of the party providing for the child; but such adoption may be renounced and then the implied assumpsit terminates. *Ib.*
6. (*Principal and collateral securities.*) Where a creditor receives collateral security for a bond and mortgage, and agrees to indorse the amount when paid on the bond and mortgage, and then assigns the principal securities, the debtor on subsequently paying the collateral security to a third person to whom it has been passed, cannot, under the common money counts in an action of assumpsit, recover back the money from the original creditor; his remedy is to require the assignee who took the assignment subject to its equities, to allow the payment. *Seymour v. Lewis*, 19 Wend. 512.

**AUTHENTICATIONS.** (*Of deed executed in another state.*)

To render a certified copy of a deed, recorded in another state admissible in evidence in Missouri, it should appear by the certificate of the clerk in certifying the official character of the judge, that he is the presiding judge or justice of the court of which he is clerk;—therefore, a certificate of the clerk of the court of Hartford county, that A. B. is presiding judge of the 6th judicial district, composed of Baltimore and Hartford counties, is insufficient. *Quere*: would the words “duly commissioned and sworn” in this final certificate of the clerk, be equivalent to the words of the act of congress, “duly commissioned and qualified?” *Paca v. Dutton*, 4 Missouri, 371.

**BAILMENT.** (*Liability of stage coach proprietors.*) Stage coach proprietors are answerable as common carriers, for the baggage of passengers; they are regarded as insurers and must answer for any loss not occasioned by inevitable accident, or the public enemies. *Hollister v. Nowlen*, 19 Wend. 234.

2. (*Same.*) The fact that the owner is present, or sends his servant to look after the property, does not alter the case, where there is no fraud on the part of the owner. *Ib.*
3. (*Same. Effect of notice.*) Stage coach proprietors, and other common carriers cannot restrict their common law liability, by a general notice that the "baggage of passengers is at the risk of the owners." *Ib.*
4. (*Same.*) If a carrier can restrict his common law liability, it can only be by an express contract, as a contract cannot be implied or inferred from a general notice, though brought home to the knowledge of the owner of the property. *Ib.*
5. (*Same.*) A common carrier, like other insurers, may demand a premium proportioned to the hazards of his employment; he may therefore require the owner of goods to give such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care necessary to the discharge of the trust; and if the owner give an answer false in a material point, the carrier will be absolved from the consequences of a loss not occasioned by negligence or misconduct; but in such case actual notice of the requirements of the carrier must be brought home to the knowledge of the owner of the goods. A general notice posted up in the stage coach office and other places is not sufficient to subject the owner to the charge of fraud. It seems that the only safe course for the carrier is to announce his terms to every individual who applies at his office, and at the same time place in his hands a printed paper specifying such terms. *Ib.*
6. (*Duty of delivering trunks and baggage.*) Common carriers are bound to deliver to each passenger at the end of his journey, his trunk or baggage. The whole duty in this respect rests upon the carrier. The exercise of ordinary care in marking the baggage, entering it upon a way-bill and delivering a check ticket to the owner, renders easy its discharge. The passenger is not required to expose his person in a crowd, or endanger his safety in the attempt to designate or claim his property. *Cole v. Goodwin*, 19 Wend. 251.

7. (*Same.*) It was accordingly held, in this case, that the proprietors of a stage coach were responsible for the loss of a trunk, although the passenger, after his arrival at the end of his journey, permitted the coach to proceed without any inquiry for his trunk, and was silent on the subject for an hour after the coach had left. From this resolution the chief justice dissented. *Ib.*
8. (*Joint liabilities.*) Where an association was formed between shippers on lake Ontario, and the owners of canal boats on the Erie canal for the transportation of goods and merchandise between the city of New York and the ports and places on lake Ontario and the river St. Lawrence, and a contract was entered into by the agent of such association for the transportation of goods from the city of New York to Ogdensburgh on the river St. Lawrence, and the goods were lost on lake Ontario, it was held that all the defendants were answerable for the loss, although some of them had no interest in the vessel navigating the lake, in which the goods were shipped. *Fairchild v. Slocum*, 19 Wend. 329.
9. (*Loss by negligence.*) And it was further held, that notwithstanding an exception in the contract of the dangers of the lake, that the association were answerable for any loss occasioned by negligence or the want of ordinary care in the lading of the goods or the navigating of the vessel. *Ib.*
10. (*Declaration.*) Where in such contract the dangers of the lake were excepted, and the plaintiff in his declaration had omitted to state such exception, it was held that the variance was fatal. *Ib.*
11. (*Principal and agent.*) Where a merchant's clerk who had been out on a tour of collection for his principal, paid his fare as a passenger in a rail-road car, and committed his trunk, which contained money belonging to his principal, not exceeding a reasonable amount for travelling expenses, to the agent of the proprietors of the rail-road, and the trunk was lost, it was held that an action would not lie in the name of the principal upon the contract existing between their agent and the defend-
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ants. Per Curiam. *Weed v. The S. & S. R. Road Co.* 19 Wend. 534.

**BILLS OF CREDIT.** (*Void consideration.*) Notes of the bank of the commonwealth of Kentucky are bills of credit within the meaning of the constitution of the United States; and a promissory note, the consideration of which was said bills, is void. *Commonwealth Bank of Kentucky v. Clark*, 4 Missouri, 59.

**BILLS OF EXCHANGE AND PROMISSORY NOTES.** (*Contract of indorsement.*) By a law of the state of Georgia, demand and notice are dispensed with, and indorsers and assignors of notes are made liable as securities. By the same act, the holder forfeits his remedy if he does not sue in three months after notice to do so. The defendants in this case, who were citizens of South Carolina, bought a negro from the plaintiff, who resided in Georgia, and transferred by indorsement to the plaintiff two notes of one J. J. Logan in payment. The contract was made in Georgia, but the plaintiff knew the defendants resided in South Carolina. Held, that the contract of indorsement in this case was to be interpreted by the law of Georgia. *Holt v. Salmon & Stroud*, 1 Rice, 91.

2. (*Same.*) Under the second section of the law of Georgia referred to, if the plaintiff does not sue within three months after notice to do so, the indorser is discharged. But it is not enough, it would seem, for the indorser in such a case to prove that he has given the plaintiff notice to sue, in order to discharge himself from the indorsement; the burden rests upon him to show also, that the plaintiff had neglected to sue for three months after notice. *Ib.*

3. (*Same.*) The declaration in this case set out the making of the note, the indorsement by defendants, demand and notice, and alleged that the defendants became liable to pay, &c. Held sufficient in reference to the law of Georgia, which dispenses with demand and notice, and makes the liability of the indorser an absolute and not a conditional one. The allegation of demand and notice, though unnecessary, does not vitiate the declaration, and may be rejected as surplusage. *Ib.*

4. (*Payable on demand.*) On a note payable on demand, the maker is bound to pay immediately, and is not entitled to days of grace. The holder may sue on the same day the note is made. Any other demand than by suit is unnecessary. *Smith v. Bythewood*, 1 Rice, 245.
5. (*Statute of limitations.*) Whenever the plaintiff may sue the defendant, a cause of action may be said to have accrued to him, and from that time the statute of limitations begins to run ; consequently, upon a note payable on demand, the statute commences from the date, if it have one, and if without date, from its delivery. *Ib.*
6. (*Presumption of payment.*) Where a bill drawn by the defendant on the plaintiff's intestate, payable to a third person or order, and indorsed by the payee with a receipt of payment on the back of the bill by another person, was in the possession of the drawee : Held that the presumption of payment arising from the possession of the bill was insufficient, without proof that the receipt was in the hand writing of a person entitled to demand payment, or other sufficient evidence of payment *aliunde*. *Spann v. Ballard*, 1 Rice, 440.
7. (*Demand at counting room.*) Suit by payee against drawer, acceptor having failed to pay, and bill protested for nonpayment. Held, that demand of payment at the counting room of acceptor, of his clerk, was sufficient without showing any special authority given the clerk in regard to such matters by his principal. *Draper v. Clemens*, 4 Missouri, 52.
8. (*Suits against maker and indorser.*) In separate suits against the maker and indorser of a note, the latter after plea pleaded cannot avail himself of a subsequent payment of the note by the maker, by interposing a plea *puis darrein* ; he can require the plaintiff to proceed to trial upon the plea originally put in, but upon his omission to do so, the plaintiff may discontinue without costs. *Commercial Bank of Buffalo v. Love*, 19 Wend. 98.
9. (*Indorsed guaranty.*) Where an absolute guaranty is indorsed upon a note payable to A. B. or bearer at the time of the mak-



ing thereof, and the note and guaranty are transferred by the payee, the assignee may maintain an action in his own name against the guarantor, without showing a demand of payment of the maker of the note, and notice of nonpayment. *Hough v. Gray*, 19 Wend. 202.

10. (*Notary's notice.*) The certificate of a notary of the service of notice of presentment and protest, is defective unless it specify the post-office nearest to the reputed place of residence of the party to whom the notice is given ; it is not enough that it be stated that the notice was put into the post office at the place of presentment of the note, directed to the party at a particular place, the reputed place of his residence. *Rogers v. Jackson*, 19 Wend. 383.

11. (*General guaranty.*) A general guaranty in the words "I hereby guarantee the payment of a note made by, &c.," without naming any person as the party guaranteed, is a valid instrument, and may be enforced by any one who advances money upon it, and who may in an action on the guaranty declare as upon a promise to himself. *Watson's Ex'rs v. McLaren*, 19 Wend. 557.

12. (*Same.*) But such guaranty is not negotiable, so that an action may be brought upon it in the name of any person other than him in whose hands it first became available, unless it be upon the note, the payment of which it guarantees ; if it be upon the note, it may be treated as an indorsement, having the quality of negotiability with the further benefit of a waiver of demand and notice. *Ib.*

CASE, ACTION ON THE. (*Presumption of right.*) The doctrine of presumption of right by grant or otherwise as applied to the windows of one person overlooking the land of another, so that by an uninterrupted enjoyment for twenty years the owner acquires a right of action against his neighbor for stopping the lights by the erection of a building upon his own land, forms no part of our law ; such a rule is not adapted to the circumstances or existing state of things in this country. *Parker v. Foote*, 19 Wend. 309.

2. (*Same.*) The question of presumption of right by grant or otherwise, although there has been an uninterrupted enjoyment of an incorporeal hereditament for more than twenty years, must be submitted to the jury ; a judge is not justified in telling them that they must, but should instruct them that they may, presume a grant, except in a plain case where there is no evidence to repel the presumption arising from twenty years uninterrupted adverse user. *Ib.*
  3. (*Same.*) To authorize the presumption of a grant, the enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right ; and it must be with the knowledge and acquiescence of the owner. *Ib.*
  4. (*Master and servant.*) An action on the case does not lie against a master and servant jointly for a wilful injury done by the servant whilst driving the carriage of the master, if such carriage be not employed in the conveyance of passengers, and the master be not present when the injury occurs. *Wright v. Wilcox*, 19 Wend. 343.
  5. (*Same.*) If the injury be occasioned by the negligence or want of skill of the servant, a joint action lies against the master and servant ; the doctrine of judge Reeve in his treatise on domestic relations extending the rule to wilful injuries, adverted to, commented upon and denied. *Ib.*
  6. (*Collision of boats.*) In collision of boats on the canals, if both parties are equally in the wrong, neither of the owners can maintain an action against the other ; indeed it seems that a party suing for negligence must be wholly without fault. *Rathbun v. Payne*, 19 Wend. 399.
  7. (*Same.*) If a loss be sustained in the night-time, and it is attributable partly to the want of lights on the boat injured, or to the boat being out of the proper place on meeting another boat, a defendant is answerable only for gross negligence or wanton injury. *Ib.*
- CHARACTER. (*In slander.*) In an action of slander, plaintiff to prove his character read part of the deposition of a witness,

who stated, that he had never known his character impeached, except in the present case. To invalidate this, the defendant should have been permitted to inquire whether he had not known it impeached in other cases. *Martin v. Miller*, 4 Missouri, 47.

**COMMON CARRIERS.** (*Liability of.*) There were several actions of assumpsit against the defendants, owners of the "steamer Atalanta," for the value of certain goods shipped by the respective plaintiffs, and alleged to have been lost, on board the said steamer, plying on the Pedee River, between Georgetown and Cheraw. The defence set up was, that the "Atalanta" sunk by running on a concealed and unknown snag, in the ordinary boat channel, when the river was fairly navigable for steamboats; and that the loss which followed was not in consequence of any want of prudence and diligence on the part of the master and owners. There was a great deal of testimony offered on both sides; by the defendants to sustain, and by the plaintiffs to repel, the grounds of excuse set up; and in some respects, the evidence was conflicting and contradictory. The plaintiffs insisted especially that the defendants had been guilty of negligence after the steamer struck and went down, in not rescuing the goods and forwarding them to their destination. Upon this part of the case, his honor, the presiding judge, charged the jury—"that the duties of the master and owners did not cease with the catastrophe which arrested and detained the boat, whereby the cargo became damaged; but that they might be held liable for damages, arising from want of diligence and proper exertions towards saving and delivering the goods on board; and that the jury might regard as a proper standard of such diligence, such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property, similarly situated." The jury found for the defendants, and a motion for new trial was refused. [Richardson, J., dissenting.] *Faulkner & Carns v. Wright, Coker, & Tuttle*; *Williamson & Dunlap v. the same*; *A. & W. Dunlap v. the same*; *J. A. & W. Carns v. the same*, 1 Rice, 107.

2. (*Same.*) The general principle is, that the master and owners of boats, on inland navigable rivers, like those of vessels at sea, are common carriers; that they are bailees for hire, and bound by the obligations of the law, to deliver goods placed on board their vessels at the place of their destination; unless they are prevented from so doing by the act of God, or public enemies.
- Ib.*
3. (*Same.*) The bill of lading is the usual evidence of the contract between the owners of the vessel and the freighters. It is a contract, signed by the master for the owners, and subjects them to all the liabilities incident to it. As soon as the goods are taken on board, the owners become insurers to a certain extent; and the only causes which will excuse them for the non-delivery of the goods must be events falling within the meaning of one of the expressions, "the act of God," and "public enemies," unless the contract be specifically qualified and limited. The perils usually excepted, and for losses arising from which they are not liable, are those which do not happen by the intervention of man, nor are to be prevented by human prudence; and losses arising from them are such as happen in spite of human exertion. *Ib.*
4. (*Perils.*) It has been decided in South Carolina that a boat running on an unknown and concealed snag, in the regular boat channel of a navigable river, may fall within the excepted perils. [*Smyrl v. Niolon*, 2 Bail. Rep. 421.] *Ib.*
5. (*Same.*) The most usual contest in cases of wreck is, whether the losses from it are to be attributable to the negligence of the master, or are to be regarded as resulting from inevitable accident. When the wreck is inevitable, and a total loss is the immediate consequence, there is little difficulty in applying the general principle of law. In such a case, the master would be absolved from all responsibility. When, however, the injury, in the first instance, happens from the act of God, as by the stranding of a vessel, and after some interval of time, a loss either partial or total, is the ultimate consequence, there is much greater difficulty in deciding on the rights and liabilities of the

parties concerned. The conduct of the master or owner then becomes a subject of important consideration. If they be guilty of negligence, they will be held answerable for all the damages which proceed from it. Their duty is, to use all the means within their power and control to arrest and obviate the consequences of the disaster; and there is perhaps no better rule than that they should be bound to use such care and attention as a prudent man would have done in a similar situation, with regard to his own property. *Ib.*

6. (*Same.*) Their duty is to deliver the goods as they were left by the wreck; if not in a sound, in their damaged state. What will excuse them must necessarily depend upon the circumstances peculiar to each case; and in a great measure must be a matter of fact to be submitted to the jury. When all reasonable efforts fail to save the cargo, the ultimate loss may be fairly regarded as resulting from the first cause, as the *vis major*; upon the ground that when human exertions have failed to obviate its consequences, the "act of God" may still be regarded as continuing its operation. *Ib.*

7. (*Liability of master and owner.*) The master of a vessel, as well as the owner, is liable to the merchant or shipper of goods, for damages, in case of injury to the goods or their loss. But their liability is several and distinct. The master is liable precisely to the same extent, and in the same form of action, as the owner; but he is liable in a different character and on a different ground. Where he has no property in the vessel, and has only the conduct and management, he is the confidential servant or agent of the owners. They are bound by his contracts, by reason of their employment of the ship and of the profit which they derive from it, by the receipt of the freight money. The master is also liable on his own contract for the transportation of the goods, and by virtue of his taking charge of them for that purpose. The liability of the owners is implied by law, from the nature of the employment, on the ground of public policy. The liability of the master seems rather to be by express undertaking, and although he is not owner and re-

ceives no part of the freight, yet, on the same ground of public policy and in favor of commerce, he is made personally responsible on his undertaking, even where the owners are known, which is thus far a departure from the general law of principal and agent. *Patton's Adm'r. and Adm'r. v. Magrath & Brooks*, 1 Rice, 162.

8. (*Same.*) Although the master and owner of a vessel are both liable to the merchant, as carriers, for the loss of goods, yet they are liable severally, and a joint action cannot be maintained against them. *Ib.*

CONSIDERATION. (*In bill of sale.*) In an action on a bill of sale, not under seal, it is not necessary to set forth a consideration, or to prove it. *Sloan v. Gibson*, 4 Missouri, 33.

2. (*Failure of.*) D. had a negro which J. wished to purchase. D. owed R. a sum of money, and it was agreed between D. and J. that J. should have the negro, if he would pay R. the sum D. owed him, and procure R.'s receipt and discharge to D. J. thereupon gave his bond to R. and R. gave the receipt to D. The negro obtained his freedom. Held, that the consideration of the bond to R., was the discharge of the debt due him by D., and that R. was not affected by the slave obtaining his freedom. *Relfe v. Jones*, 4 Missouri, 89.

CONSTITUTION. (*Amendment of, in Missouri.*) Where one general assembly proposes amendments to the constitution of the state, which are ratified and adopted by the next general assembly, the supreme court may yet look into their proceedings, to see that all prerequisites have been complied with, and that they have been adopted by proper majorities. *The State v. McBride*, 4 Missouri, 302.

2. (*Same.*) An amendment which is ratified by two thirds of a quorum—that is, two thirds of a majority of all elected, is ratified by two thirds of the house, within the meaning of the constitution. *Ib.*
3. (*Divorce.*) The act of the general assembly granting a divorce of Gentry and wife—unconstitutional. *State v. Fry and others*, 4 Missouri, 120.

CONSTITUTION OF THE STATE OF SOUTH CAROLINA  
AND OF THE UNITED STATES. (*Taking of private property for public use.*)

The 35th section of the act of 1835, (acts of 1835, p 54,) incorporating the Louisville, Cincinnati and Charleston Rail Road Company, provides, "that where any lands or right of way may be required by the said company, for the purpose of constructing their road, and for want of agreement as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by commissioners," &c. Held, to be constitutional. *The Louisville, Cincinnati & Charleston Rail Road Company v. Chappell*; *Same v. Reese*, 1 Rice, 383.

2. (*Same.*) All the writers upon the fundamental principles of national societies agree, and it has now become a principle of universal law, that private property, whether real or personal, may be taken for public use, upon just compensation to the owner. This doctrine has been uniformly recognised in this state. See the cases of *Lindsay v. Com'rs*, 2 Bay, 38; *Ford v. Whitaker*, 1 N. & M'Cord, 5; *M'Gowen v. Starke*, 1 N. & M'Cord, 387; *Com'rs v. Singleton*, 2 N. & M'Cord, 528; *Eaves v. Terry*, 4 M'Cord, 125; and *State v. Dawson*, *Riley's Coll.*, 103. *Ib.*
3. (*Same.*) The exercise of such a power belongs to the eminent domain of the state, and it devolves upon the legislature to decide in regard to great works of improvement, whether the public benefit is of sufficient importance to justify the exercise of the eminent domain in such cases. *Ib.*
4. (*Same.*) And the only restriction is, that private property cannot be taken without just compensation to the owner. *Ib.*
5. (*Same.*) The exercise of this power in relation to the Louisville, Cincinnati and Charleston Rail Road, is to be found in the authority conferred in the charter upon the company to lay out and construct a road between the given termini; and in the actual construction of the road the company are to be considered so far the mere authorized agents of the state, to execute the power conferred. *Ib.*

6. (*Same.*) The Louisville, Cincinnati and Charleston Rail Road is to be considered as a great public improvement, and when made, a public highway, and the legislature may appropriate private property for such improvement, or authorize a corporation thus to appropriate it, upon full compensation to the owner. *Ib.*

7. (*Same.*) The 37th clause of the act of incorporation, provides a full and ample mode of compensation to the land owner, for any loss or damage he may sustain by the company, in taking his property, in which the trial by jury is preserved, and which constitutes the proper tribunal for the decision of such questions. *Ib.*

8. (*Criminal law of the United States.*) A state court has no jurisdiction over the offence of stealing a letter from the mail in violation of the act of congress of 1825, regulating the post-office department. (The case of the State *v.* Wells, 2 Hill, 687, contra, overruled.) *The State v. M<sup>r</sup> Bride*, 1 Rice, 400.

9. (*Same.*) By the constitution of the United States as well as upon general principles of law, a criminal offence arising under and created by an act of congress is punishable only in the courts of the United States. *Ib.*

10. (*Same.*) An act of congress conferring jurisdiction in such a case upon the state courts, is unconstitutional and void. *Ib.*

CONTRACT. (*Performance of.*) If work be done under a special agreement, the agreement must be complied with before the party can recover any thing; and this is equally the case, whether all the work be done, or only a part. *Helm v. Wilson*, 4 Missouri, 41.

2. (*Same.*) It seems that the work must be done, and the contract complied with, both as to time and manner, before the party can recover at all. *Ib.*

3. (*Same.*) This is not the case if the other party prevents the doing of the work—or the times of the contract are varied by agreement—or performance is prevented by the act of God. *Ib.*

4. (*Same.*) If a mechanic undertake to build a "good rough stone wall," and he builds one in a very unworkmanlike man-



ner, he cannot recover any thing for his labor. *Feagan v. Meredith*, 4 Missouri, 514.

5. (*Same.*) Nor will payment of part of the stipulated price and a promise to pay the balance, before the defect in the work is discovered, constitute such an acceptance of the work as to impose any obligation on the employer to pay the balance. *Ib.*
6. (*Same.*) A agrees to pay B. for a certain stone wall, when he (A) should build on the same, sell the same, or dispose of the lot, on which it was constructed. Held, that A is entitled to a reasonable time to build or sell, and until that event takes place B cannot recover. What would be a reasonable time must depend on the circumstances of each case. *Bryant v. Saling*, 4 Missouri, 522.
7. (*Same.*) A purchaser of land agrees to pay the purchase money, on the delivery of the patents. Held, that vendor cannot recover in a court of law, without a compliance with the condition precedent, notwithstanding an act of congress passed subsequently to the making of the agreement may have rendered the delivery impracticable or unnecessary. *Chouteau v. Russell*, 4 Missouri, 553.
8. (*Promise to a sheriff.*) A promise to a sheriff to indemnify him against all damages to which he may be subjected in consequence of discharging from custody a third person, whom he has arrested on legal process is void, as taken *colore officii*, although the sheriff was induced to grant the discharge upon a false representation of the promissor that the debt, to enforce the payment of which the process had issued, had been satisfied. *Webber's ex'rs v. Blunt*, vide note, 19 Wend. 188.
9. (*Contract to indemnify and save harmless.*) An action will not lie on a promise by one to indemnify and save another harmless from all loss which he may sustain in consequence of making advances to a third person at the request of the promissor, without showing an ineffectual attempt to coerce payment from the party to whom the advances were made, or that endeavors to collect the money from him would have been useless by reason of his insolvency or otherwise. *Ward v. Fryer's Ex'x*. 19 Wend. 494.

10. (*Obligations of party contracting.*) If a party covenant to do an act, he is bound to perform what he undertook to do, or pay damages; the difficulty or improbability of accomplishing the undertaking will not excuse him. Nothing short of showing that the thing to be done cannot by any means be accomplished will relieve him from his obligation. It was accordingly held in this case, where the defendant had covenanted that he would perfect in England a patent right granted in this country so as to ensure to the plaintiff the exclusive right of vending the article patented in the provinces of Upper and Lower Canada, that he was not excused from performance, although it appeared that the power of granting exclusive privileges of this kind appertained not to the mother country, but to the provinces, and were never granted except to subjects of Great Britain and residents of the provinces, and could not be granted to either the plaintiff or the defendant, as both were citizens of this country. *Beebe v. Johnson*, 19 Wend. 500.

11. (*Foreign domicil.*) An American citizen, it seems, may obtain a foreign domicil, which will impress upon him a national character for commercial purposes. *Ib.*

CONVEYANCES. (*By husband and wife in Missouri.*) A conveyance by husband and wife of land held in right of the wife, made after the introduction of the common law in 1816, and before the act of '21, expressly authorizing such conveyances, is void—both by the Spanish law, which the adoption of the common law did not repeal, and by the common law itself. *Lindell v. McNair*, 4 Missouri, 380.

CORPORATION. (*Forfeiture of shares.*) An incorporated company has not the power to create a by-law, subjecting to forfeiture shares owned by individuals in the stock of the company, for the non-payment of instalments due upon such shares, unless the power to pass such by-law is expressly granted by the charter of the company. *In the matter of the Long Island Railroad Co.*, 19 Wend. 37.

COVENANT. (*To indemnify and save harmless.*) To sustain an action on a covenant to indemnify and save harmless a party

from his liability on a bond and mortgage executed by him, it is not necessary to show that the covenantee has been compelled by a course of legal proceedings to pay the debt ; it is enough that it appear that money had become due on the bond and mortgage, and that he had paid the same. *Webb v. Pond*, 19 Wend. 423.

**CRIMINAL LAW.** (*Evidence in trial for rape.*) On the trial of a person charged with the crime of rape, or an assault with an intent, &c., the inquiry may be made of the prosecutrix whether she had previous connection with other men ; and it seems that she, in such case, is not privileged from answering. *The People v. Abbot*, 19 Wend. 192.

2. (*Same.*) The prosecutrix may be shown to be in fact a common prostitute ; so also a previous voluntary connection between her and the prisoner may be proved ; and evidence may be given of particular acts and associations, indicating on her part a want of chastity. *Ib.*
3. (*Same.*) It seems also, that the general character of the prosecutrix as a common prostitute may be shown ; and that the prisoner is not restricted to proof of her general character for truth and veracity, but may give evidence of her general moral character. *Ib.*
4. (*Malicious mischief.*) Malicious mischief done to any kind of property is a misdemeanor, and the party doing the injury may be prosecuted criminally. *Loomis v. Edgerton*, 19 Wend. 419.
5. (*Trial for murder.*) On the trial of an indictment for murder, where there is no pretence that the prisoner killed the deceased, while engaged in a riot or other misdemeanor, not amounting to a felony, by misadventure, but the death ensued in consequence of an intentional violence upon the person of the deceased, whether the prisoner designed to kill or not, he is not entitled to have the jury instructed, that they cannot convict of murder, if they should come to the conclusion that the mortal wound was inflicted in committing, or attempting to commit an offence, which of itself is less than a felony. *The People v. Rector*, 19 Wend. 569.

6. (*Opinions.*) The opinions of witnesses as to the improbability of a blow having been given from which death ensued, judging from the relative positions of the parties as stated by witnesses, are not admissible in evidence. *Ib.*

DECEIT. (*In sale of property.*) If the owner of property stands by and sees another sell his property, and says nothing when he might with propriety speak, he shall not afterwards have the property; much less can he have it, when he encourages another to buy. *Skinner v. Stouse*, 4 Missouri, 93.

DEED. (*To husband and wife.*) By a deed to husband and wife, the grantees hold the fee, not in moieties but in severalty, (*per tout et non per my*,) with the right of survivorship; neither the husband or wife can in their own right alien any part without the concurrence of the other, nor can the husband's creditors take his interest in execution. It seems, however, that the husband may alone execute a mortgage of his interest, and may also give a lease in his own name for the purpose of bringing ejectment. *Jackson v. McConnell*, 19 Wend. 175.

2. (*Same.*) If in the purchase of land, the consideration money be advanced by the husband and a deed taken in the name of the wife, the transaction will in the first instance be deemed an advancement to the wife; but it is open to explanation, and if it be shown that the object of the husband was to defraud creditors, he will be deemed to have a resulting interest in the premises, which may be sold by execution. *Guthrie v. Gardner*, 19 Wend. 414.

DEVISE. (*Power to sell.*) The plaintiff's testator devised among other things, as follows: "It is my will and desire that all the rest and residue of landed and real estate, and of such real estate as may hereafter come to the possession of my executors, now in dispute, and to which I have a claim, be sold by my executors," &c. By another clause, he directs the proceeds of the sales, with other funds, to be applied to the payment of his debts. Held, that by the will, the executors had a mere power to sell the lands, and could not maintain an action of trespass to try title, the fee itself being in the heir. *Ex'ors of Ware v. Murph*, 1 Rice, 54.

2. *Same.*) "The distinction is between a devise to executors to sell," as if the testator say, "I devise my land to my executors to be sold," and a devise that the executors shall sell, as where the testator says, "I devise or direct that my lands be sold by my executors." In the first case, the fee passes to the executors; in the last, the fee passes to the heir, to be divested whenever the power is executed by the executors. *Ib.*
3. (*Same.*) A direction to the executors to pay the debts from the proceeds of the sales will not vary the rule. *Ib.*
4. (*Description of premises.*) Where a testator is the owner of the moiety of a lot containing one hundred and twenty acres, and by his will devises "the one half of lot No. 137 containing sixty acres of land," the moiety of the whole lot, and not merely a moiety of the sixty acres passes to the devisee. *Brownell v. Brownell*, 19 Wend. 365.

**DOWER.** (*Equity of redemption.*) Generally, a widow is entitled to dower in the equity of redemption of an estate mortgaged by her husband before coverture; but she cannot enforce her claims, at law, against the mortgagee or those claiming under him. If there has been an entry under the mortgage after forfeiture, or the equity of redemption has been released by the husband to the mortgagee or those claiming under him, the widow is not entitled to recover at law. *Van Dyns v. Thayre*, 19 Wend. 162.

**EJECTMENT.** (*Land conveyed to husband and wife.*) It is not necessary that the wife should join with the husband in an action of ejectment, for the recovery of land conveyed to husband and wife. *Jackson v. Leek*, 19 Wend. 339.

**ERROR.** (*Variance.*) Where a guaranty is given for the payment of a promissory note, which note is particularly described in the instrument, and the note produced on the trial corresponds in amount, date and time of payment, but varies in other particulars, the objection of variance will not be heard on a writ of error, if it was not urged on the trial. *Watson's Executors v. McLaren*, 19 Wend. 557.

**EVIDENCE.** (*Declarations of deceased party.*) The declara-

tions of a deceased party to a note, who, if alive, could be examined as a witness in the case to the same point, are incompetent and inadmissible. *Duncan v. Seaborn & Cobb*, 1 Rice, 27.

2. (*Interest.*) Where the interest of a witness is of a doubtful nature, it goes to the credit, and not to the competency. A party has such a direct and immediate interest as will disqualify him, when the necessary legal consequence of the verdict will be to better his situation, either by securing an advantage or repelling a loss: he must be a gainer or loser by the event. *Gist and another v. Rogers*, 1 Rice, 79.
3. (*Proceedings in equity.*) Proceedings in a court of equity establishing the lunacy of the plaintiff, are admissible as evidence of the fact in an action at law by him against a third person not a party to the proceedings. *McCraight v. Aiken*, 1 Rice, 56.
4. (*Ancient deed.*) Where possession of lands has been held under a deed more than thirty years old, the deed is admissible in evidence as an ancient deed without proof of its execution. *Wagner and another v. Aiton*, 1 Rice, 100.
5. (*Confession.*) Where a man is charged with a crime, and does not deny it, a jury is well warranted (especially in connection with strong circumstances) in finding a verdict of guilty. *State v. Stone*, 1 Rice, 147.
6. (*Loss of original documents.*) Where the original proceedings in partition were proved to have been lost and on diligent search could not be found, secondary evidence, consisting of entries in the sheriff's books and in the minutes of the court, were held admissible in proof of the plaintiff's title under the partition. *Smith v. Smith*, 1 Rice, 232.
7. (*Admission by administrator.*) The admission of an administrator as to a fact within his own personal knowledge, and which he could be compelled to prove, if he were not a party to the suit, is admissible in evidence in an action against him as administrator, to charge the estate of the intestate. *Slead v. Brannan, adm'r*, 1 Rice, 298.

8. (*Interest of witness.*) The general rule established by all the cases is, that to render a witness incompetent on the ground of interest, his interest in the event of the suit should be a present, certain and vested interest, and not uncertain and contingent. *Spann v. Ballard*, 1 Rice, 440.
9. (*Same.*) Where in an action by an administratrix for the recovery of a debt due to the intestate, one of the heirs at law, and a distributee of the estate who had received his share and settled with the administratrix, was offered as a witness and objected to on the ground of interest, the witness executed and tendered an assignment or release of all interest in the recovery; it was still contended that he was incompetent by reason of his liability to refund, in case of further claims against the estate not yet exhibited. Held, in the absence of any proof of outstanding demands or deficiency of assets in the hands of the administratrix, that the supposed interest of the witness in increasing a fund out of which he could receive no dividend, was too remote and contingent to sustain the objection. *Ib.*
10. (*Surveyor's certificate.*) When the surveyor of the land of the United States in the state of Missouri certifies copies of papers required by law to be deposited in his office, his handwriting need not be proved to authorize such copies to be given in evidence. *Bryan v. Wear and another*, 4 Missouri, 106.
11. (*New Madrid certificate.*) A New Madrid certificate upon which a location and survey have been made, is properly deposited in the surveyor's office, and a copy may therefore be certified by him and given in evidence. *Ib.*
12. (*Character of witness.*) Where the present character of a witness for truth and veracity is slightly impeached, evidence of bad character in that respect in years past is admissible. *The People v. Abbott*, 19 Wend. 192.
13. (*Seller of property in litigation.*) A vendor of personal property is not a competent witness to prove the sale fraudulent, in a contest respecting the same between his creditors and the vendee. *Rea v. Smith*, 19 Wend. 293.
14. (*Same.*) The release of the vendor, by the officer sued for

the taking of the property, does not render the vendor a competent witness. *Ib.*

15. (*Release by husband.*) Where an action of ejectment is brought against a husband for the recovery of real estate belonging to his wife, a release, executed by the husband to a witness objected to as incompetent on the ground of his liability to the wife under a covenant for quiet enjoyment, is good and valid, and removes the objection to the competency of the witness. *Ford v. Walsworth*, 19 Wend. 334.
16. (*Grantor in deed.*) A person alleged to be the grantor in a deed of real estate, is a competent witness to prove the deed a forgery, in a question of title between third persons; although he is not competent to prove a want of consideration. *Jackson v. Leek*, 19 Wend. 339.
17. (*Privilege of counsel.*) Counsel professionally consulted may be required to testify, if the privilege be waived by the party who consulted him, although the interest in the subject matter respecting which the confidential communication was made has passed to a third person, and he objects to the disclosure. *Benjamin v. Coventry*, 19 Wend. 353.
18. (*Defect in execution of commission.*) Where a commission to take testimony is sued out by the plaintiff, in which the defendant joins and furnishes cross-interrogatories, and the commission with the depositions of witnesses be returned, and it does not appear that the last general cross-interrogatory has been put to and answered by the witnesses, and the defendant on that ground objects to the reading of the depositions in evidence, the objection in general is fatal. *Kimball v. Davis*, 19 Wend. 437.
19. (*Same.*) The plaintiff, however, is at liberty in such case to show that the commission was executed and the depositions signed by the witnesses in the presence of the counsel of both parties, and that no objection was made at the time by the counsel for the defendant, that all the interrogatories were not answered; and on such facts appearing, the depositions will be received, notwithstanding the objection. *Ib.*
20. (*Declarations of witnesses.*) The declarations of witnesses,



whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible in evidence, if objected to. The only way for a party to avail himself of such declarations is to sue out a second commission. *Ib.*

21. (*Character of witness.*) Where the general moral character of a witness is impeached, whether by witnesses called for that purpose, or on his own cross-examination, it is competent for the party calling him to adduce testimony, in support of his character for truth and veracity, so that the jury may pass upon his credibility. *The People v. Rector*, 19 Wend. 569.

**EXECUTORS AND ADMINISTRATORS.** (*Trover by.*) An administrator who has never had possession of the goods of his intestate may notwithstanding maintain trover in his own name, for a conversion of such goods after the death of the intestate. (*S. P. Hill v. Brannon*, 285.) *Kirby v. Quinn*, 1 Rice, 264.

2. (*Same.*) The general rule is, that the owner of a chattel entitled to immediate possession, may maintain trover against a wrong doer; the legal effect of granting administration, is to vest in the administrator the legal estate, in all the intestate's personal property, and this has relation back to the death of the intestate. He is the legal owner, the letters of administration are the evidence of his title, and hence for a conversion in his own time, he must always produce and give in evidence the letters of administration. (*S. P. Browning v. Huff*, 2 Bail. 174.) *Ib.*
3. (*Same.*) In such a case it is not necessary or proper that he should sue in his representative character, or style himself administrator. *Ib.*

**EXECUTOR DE SON TORT.** (*Where there is a rightful administrator.*) A person may be charged as executor de son tort, although there be a rightful administrator. *Foster and another v. Nowlin*, 4 Missouri, 18.

2. (*Local law.*) S. lived in Tennessee, and there died, possessed of personal property in that state. After the death of S., de-

fendants took the property and brought it to Missouri. Held, that defendants may be charged as executors de son tort in Missouri. *Ib.*

3. (*Same.*) And defendants are liable according to the laws of Missouri, and the laws of Tennessee need not be proved. *Ib.*

**FOREIGN LAWS, JUDGMENT, AND JUDICIAL PROCEEDINGS.** (*Judgment of justice of the peace.*) A judgment recovered before a justice of the peace in another state, though wanting some of the characteristics of a judgment, technically speaking, and not considered as a matter of record, is to be regarded in the courts of South Carolina as prima facie evidence of debt, and is placed precisely on the same footing as foreign judgments, by the common law. Such judgment is, therefore, a good foundation for an action here, independently of the original cause upon which it was rendered. *Clark & Smith v. Parsons*, 1 Rice, 16.

2. (*Same.*) General reputation is not competent evidence of the authority of a justice of the peace of another state; a transcript of the act appointing the justice and conferring on him his authority, would be higher evidence in the power of a plaintiff to produce—and, it seems, the printed laws of another state, published under the authority of the legislature of the state, would also be competent evidence. [See *Allen v. Watson*, and another, 2 Hill. R. 319.] *Ib.*

See **BILLS OF EXCHANGE.**

**FRAUD.** (*In sale on execution.*) Where an attorney directs an execution to issue, contrary to the instructions of his client, and the sheriff sells property under the execution, it is yet necessary, in order to affect the purchaser at the sheriff's sale, to prove him informed of the fraud of the attorney. *Russell v. Geyer and others*, 4 Missouri, 384.

2. (*Same.*) The attorney for plaintiffs in execution, purchases the property at sheriff's sale, professing at the same time to act as agent for his clients, and with a view to the payment of their executions—he holds the property for six or eight months, to give the defendant in execution time to pay off the executions,

and with a promise in that event, to reconvey to defendant—finally, the defendant failing to make any tender, he sells the property at public auction, to satisfy the demands of his client. Held, that there being no evidence of fraud, on the part of the attorney, arising from gross inadequacy of price or otherwise, either at the sheriff's sale, or the sale at auction, he is not to be considered as a trustee for the benefit of defendant's creditors, and the purchaser takes a good, legal and equitable title. *Ib.*

3. (*Unsoundness.*) It is not fraud for a person to sell unsound property, knowing it to be unsound. But it seems that if the purchaser did not know of the unsoundness, and the seller concealed it, it would amount to fraud. If the purchaser ask relief, because of a slave being diseased when sold, and his subsequent death,—it should appear in evidence, that the disease of which he died was that he had at the time of sale, and that the purchaser did not know at the time of purchase of his unsoundness. *Stewart and another v. Dugin*, 4 Missouri, 245.

**FRAUDS, STATUTE OF.** (*Auctioneer.*) Where an auctioneer in making an entry of a sale in his sale-book omitted to comply with the requirements of the statute regulating sales at public auction, in consequence of which the sale could not be enforced and the owner of the property suffered a loss on a re-sale; it was held, that the auctioneer being answerable only for gross negligence or ignorance, was not liable in damages; the act having been recently passed, being of doubtful construction, and not having received a judicial interpretation. *Hicks v. Min-turn*, 19 Wend. 550.

**FREEDOM.** (*Ordinance of 1787.*) An officer of the United States army, who takes a slave to a military post within the territory wherein slavery is prohibited, and retains her several years in attendance on himself and family, forfeits his property in such slave by virtue of the ordinance of 1787. *Rachael v. Walker*, 4 Missouri, 350.

2. (*Suit for under the law of Missouri.*) In a suit for freedom, under the statute of Missouri, where the plaintiff claims on the ground that the master has violated the constitution of Illinois, by

introducing slavery therein, the test question to ascertain whether such violation has been committed, and a consequent forfeiture taken place, is, whether the master made any unnecessary delay in Illinois with his slaves. *Wilson v. Melvin*, 4 Missouri, 592.

3. (*Same.*) It is not whether the slave acquired a residence. *Ib.*

4. (*Same.*) Nor is it, whether the master became a domiciliated resident of Illinois; nor is it of any consequence that the slave remains voluntarily in Illinois. *Ib.*

5. (*Same.*) Where the testimony clearly proved that defendant left Tennessee with an intention of residing in Illinois, and that after a month's stay in Illinois, he proceeded to St. Louis to hire out his negroes, and after so doing, returned to Illinois and spent the summer—raised a crop, &c., it is error for the court to give an instruction founded on the assumption that defendant was a mere transient sojourner in Illinois—such instruction being well calculated to mislead the jury. *Ib.*

GIFT. (*Mortis causa.*) The delivery of a note by a party in his last illness, by which the maker “at his death promises to pay, or cause his executors or administrators to pay, a certain sum of money to the payee or his heirs,” creates no obligation on the part of the maker, or his representatives, after his death, and cannot be supported or enforced as a *donatio causa mortis* of the money mentioned in the note. *Hall v. Adm'rs of Howard*, 1 Rice, 310.

2. (*Same.*) To constitute a valid gift either *inter vivos*, or *causa mortis*, the donee must have an immediate right to the dominion of the chattel given; in the latter case defeasible on the recovery of the donor. *Ib.*

3. (*Same.*) *Quere.*—Under the spirit of the law of South Carolina which requires three witnesses to a will of personal as well as of real property, how far are donations *causa mortis* to be countenanced by the courts of that state? *Ib.*

GUARANTY. (*Interest.*) A letter of guaranty was given by the defendant to the plaintiff, by which the defendant consented to be liable for the amount which a third person, whom he recommended as a customer to the plaintiff, might, at the time of

the delivery, receive. The party received goods to the amount of \$225 03½. Defendant repeatedly acknowledged his liability to pay this amount, and afterwards promised to pay the same. Held, that inasmuch as interest was not recoverable by the law of South Carolina, against the principal debtor upon the open account, in this case, the obligation imposed by the guaranty making defendant liable only to the same extent, interest could not be recovered from him. *Bishop v. Ross*, 1 Rice, 21.

**HIGHWAYS.** (*Banks of navigable rivers in Missouri.*) The banks of navigable rivers, in Missouri, are public highways, and though owned by private individuals, fishermen and navigators are entitled to a temporary use of them, in landing, fastening and repairing their vessels, and exposing their sails or merchandize; yet this right has its reasonable qualifications and restrictions, and will not allow a navigator to land for several weeks, and under pretence of repairing, build houses, employ teams, &c., thereby unreasonably obstructing the owner's enjoyment of his property. *O'Fallon, ex'r of Mullanphy v. Daggett and another*, 4 Missouri, 343.

**INDICTMENT.** (*Invalid—Effect of.*) There can be no legal trial in a capital case, without a sufficient and valid indictment. An indictment alleging the offence to have been committed in another district than the one in which the bill was found, would be insufficient and invalid; and equally so, if it assigned an impossible date to the commission of the offence, as a day posterior to the finding of the indictment. *The State v. Ray*, 1 Rice, 1.

2. (*Same.*) An acquittal upon an invalid and insufficient indictment, is no bar to a second indictment for the same offence. *Ib.*
3. (*Same.*) Where an indictment in a capital case is so utterly defective that no judgment can be pronounced upon it, either of conviction or acquittal, the judge on circuit, in the exercise of his discretion, may properly withdraw the record from the jury and discharge them from the further consideration of the case, without the consent of the prisoner, and remand him for trial at a succeeding court. *Ib.*

**INFANCY.** (*Infant defendant.*) An infant defendant cannot appear by attorney and move to set aside the plaintiff's proceedings, on the ground of the want of the appointment of a guardian. *Shepherd v. Hibbard*, 19 Wend. 96.

2. (*Usurious contract.*) An infant may avoid a usurious contract entered into by him, and recover the money lent upon such contract under the count for money had and received. *Millard v. Hewlett*, 19 Wend. 301.

3. (*Same. Affirmance.*) Evidence of affirmance of such contract after the party arrived of age, to be effective, must be express and not rest in inference or construction. *Ib.*

**INSOLVENTS.** (*New promise.*) Where a defendant, after having obtained an insolvent's discharge, on receiving a letter from the plaintiffs, said, "It is an honest debt, I will pay it—I will pay part if not the whole before you leave," and there was no other evidence of any other debt due to the plaintiffs than that declared upon, which consisted of two notes given by the defendant to the plaintiffs before his discharge, and the defendant did not produce the letter, it was held that the evidence was *prima facie* sufficient to support the replication of a new promise. *Fitzgerald v. Alexander*, 19 Wend. 402.

**INSOLVENT DEBTOR.** (*Preference by in Missouri.*) It seems, that a debtor may give a preference to some of his creditors, in contemplation of taking the benefit of the insolvent act; and such preference is not therefore an undue preference—nor is it therefore fraudulent. *Jones v. Talbot*, 4 Missouri, 279.

**INSURANCE.** (*Employment of pilot.*) Where the master fails to employ a pilot to navigate a vessel in coming into or leaving a port, where it is customary to do so, (as the port of Charleston,) and a loss happens in consequence of a pilot not having been employed, the underwriters upon a policy on the cargo would be discharged. But if the vessel pass uninjured through the dangers, to avoid which a pilot is usually employed, and the loss happens at a point beyond which the pilot's service ceases to be necessary, the assured would be entitled to recover. *M<sup>r</sup> Millan & Ewart v. The Union Insurance Company*, 1 Rice, 248.

2. (*Same.*) It is an error to consider the employment of a pilot, in coming into or leaving a port, as a part of the seaworthiness of the vessel; nothing can enter into that which is not for the whole voyage. The business of a pilot is merely temporary. He is a part of the crew of a vessel for only a few miles, or a few hours. He navigates her only occasionally. Under such circumstances, it would be an abuse of terms to say, that a competent pilot was necessary to make a vessel seaworthy. The true principle seems to be, that if a vessel, without a pilot, sustain injury in entering or leaving a harbor where it is customary to have a pilot, such injury does not come within the perils insured against. It is not a peril of the sea. It is a loss from the bad navigation of the vessel, and is to be set down to the fault of the master, and consequently the owners would be liable and not the underwriters. [Per O'Neill, J.] *Ib.*

INTEREST. See GUARANTY.

- JOINT STOCK ASSOCIATION. (*Mutual promise.*) Where an incorporated joint stock association is formed, and the members of it by the articles of association promise to pay the amount of stock by them severally subscribed, in calls to be made by trustees named in the articles, an action at law lies to enforce such promise, notwithstanding that both the plaintiffs and the defendants are members of the association and consequently co-partners. *Townsend v. Goewey*, 19 Wend. 424.

LANDLORD AND TENANT. (*Waiver of notice to quit.*)

The unqualified acceptance of rent after the expiration of the notice to quit, is a waiver of the notice; where there are circumstances creating a doubt as to the *quo animo* it is received, or as to the *bona fides* of the tenant, the question should be submitted to a jury; and it seems that though it is not the absolute duty of a judge to leave the question to a jury where there are no qualifying circumstances, yet that it would not be amiss to do so. *Prindle v. Anderson*, 19 Wend. 391.

LARCENY. (*Intention to steal.*) Since the act of the general assembly, (Revised Code, page 179, section 42) if A hires a horse, and either at the time he gets possession of him, or after-

wards, conceives the design of stealing him, and carries him away with that design, he is guilty of larceny. *Norton v. The State*, 4 Missouri, 461.

**LIBEL.** (*Smuggling.*) A charge of smuggling goods into the country is libellous. *Stillwell v. Barter*, 19 Wend. 487.

2. (*Justification.*) It is no answer to a libel charging a party with having been actively and profitably engaged in smuggling during the period of the late war, that he had violated the revenue laws in a single instance previous to the war and in a time of peace; the justification, to be efficient, must be as broad as the libel. *Ib.*

**LIEN.** (*On land sold.*) A vendor who conveys in fee simple to the purchaser from his vendee, retains a lien on the lands for the purchase money in the hands of such purchaser. Wash, Judge, dissenting. *Marsh v. Turner and Lisle*, 4 Missouri, 253.

**LIMITATIONS, STATUTE OF.** (*Absent defendants.*) Action of assumpsit. Plea statute of limitations. Replication that defendant was out of the state at the time the cause of action accrued against him, and that the suit was brought within two years after the defendant's return to the state. The judge below nonsuited the plaintiff on the ground, that his cause of action was barred by the statute, there being no saving in the statute as to the absent defendants. Nonsuit set aside and new trial granted. (The judges all concurring in granting a new trial, but delivering separate opinions.) *Smith v. Mitchell*, 1 Rice, 316.

2. (*Same.*) Although the act of limitations of 1712, (P. L. 102,) requires all actions of account, upon the case, &c., to be brought "within four years next after the cause of such actions, or suits, and not after;" and contains in itself no express saving, or exception, as to causes against persons out of the state, at the time such causes of action may accrue against them; yet upon the construction of the whole act: Held, that when such a cause of action accrues to a plaintiff, resident in South Carolina, against a party residing out of that state at the time, the statute does not



begin to run until his return within the jurisdiction of the courts of South Carolina. (Per Richardson, J., in delivering the opinion of the court. Butler, J., concurring.) *Ib.*

3. (*Alteration of time.*) Assumpsit on a promissory note, pleas, non assumpsit within six years, and non assumpsit within ten years. At the time the note was made, the limitation was five years; at the time it became due, it was ten years. Held, that the plea of non assumpsit within ten years is good. *Davis v. Hascall*, 4 Missouri, 58.
4. (*Acknowledgment.*) An acknowledgment by B, that he had given the note sued on—had not paid it, and did not intend paying it, because it was given for land to which the payee had no title; is not sufficient to take the case out of the statute of limitations. *Buckner v. Johnson, adm'r*, 4 Missouri, 100.
5. (*Same.*) To take a case out of the statute, there must either be an express promise to pay, or an acknowledgment of a real subsisting debt, on which the law would raise a promise to pay a particular sum. *Ib.*
6. (*Same.*) It is not sufficient to take the case out of the statute, for a plaintiff to prove by a witness that in a conversation between defendant and witness, relating to the subject matter in controversy, within five years before the commencement of the suit, defendant informed the witness "that he must have some money or plaintiff would sue him." *McLean, adm'r of Brockman v. Thorp*, 4 Missouri, 256.
7. (*Same.*) Nor would an acknowledgment by defendant, that plaintiff had not received the amount of his demand, be such an acknowledgment as would imply a new promise to pay on the part of defendant, which is necessary to take the case out of the statute. *Ib.*
8. (*Commencement of.*) Where a promissory note is made payable on a day specified after the date thereof, the statute of limitations commences running from the time it becomes due, and not from the date of its execution. A plea of the statute in actions on such notes must be framed accordingly. *Johnson adm'r v. Buckner*, 4 Missouri, 624.

**LUNATICS.** (*Stultifying one's self.*) The old rule was, that a party could not stultify himself; but it is now subject to many modifications, and it may now generally be stated, that if a party sought to be charged with a contract, can show that he was so devoid of understanding as to be utterly incapable of understanding it, he is not bound by it. *McCreight v. Aiken*, 1 Rice, 56.

2. (*Evidence of lunacy.*) Proceedings in a court of equity, establishing the lunacy of the plaintiff, are admissible to prove the lunacy of the plaintiff, in an action at law by him against a third person not a party to the proceedings. *Ib.*
3. (*Suits, &c. by.*) In chancery, the rule of practice is uniform, that where the committee of a lunatic sue for any thing in the right of the lunatic, the committee, as well as the lunatic, must be made parties. In suits at law, the rule is otherwise. There, the action must be brought in the name of the lunatic alone, if of full age; and if under age, by guardian. So, in the case of a lunatic defendant, if he be within age, he must appear by guardian; and if not of full age, by attorney. *Ib.*

**MORTGAGE.** (*Effect of foreclosure of, in Missouri.*) Where a mortgagee, after taking the necessary steps pointed out by the statute, forecloses a mortgage, a purchaser under the foreclosure takes the title, divested of all rights and interests derived from the mortgagor subsequent to the mortgage. *Russel v. Heirs of Mullanphy*, 4 Missouri, 319.

**MORTGAGE OF PERSONAL CHATTELS.** (*Notice.*) A purchaser of personal property, with notice of the existence of a mortgage covering it, cannot avail himself of the facts that the mortgage was unaccompanied by a delivery of the possession, and that it had not been filed in the town clerk's office. *Sanger v. Eastwood*, 19 Wend. 514.

2. (*Delivery.*) In a mortgage of goods and chattels, where the things mortgaged are in the actual possession of a third person, it is not necessary to the validity of the instrument, that it should be accompanied by an immediate delivery of the things assigned. *Nash v. Ely*, 19 Wend. 523.

**MORTGAGE OF REAL ESTATE. (*Agreement to reconvey.*)**

The mere fact of a conveyance of land, and an agreement for a reconveyance at a future day at an advanced price, at the election of the grantor, afford no evidence of an intention that the deed should be considered as a mortgage. *Glover v. Payn*, 19 Wend. 518.

2. (*Payable at or before a day certain.*) A mortgage payable at or before a day certain may be paid immediately ; the mortgagor cannot be required to keep the money and pay interest until the day specified in the mortgage. *In the matter of John and Cherry Street*, N. Y., 19 Wend. 659.

**NEW TRIAL. (*Interest of witness.*)** Where a witness swears without any knowledge or consciousness of interest in the cause, and without any objection on that account at the trial, the discovery of a document, or other evidence, afterwards, which goes to show that the witness was in fact interested, does not furnish in itself any ground for a new trial. *Tillman and another v. Hatcher*, 1 Rice, 271.

2. (*Exceptions to judge's charge.*) A new trial will not be granted, because the judge in his charge to the jury remarks that in his opinion there is not sufficient evidence to establish a certain fact, when at the same time he instructs the jury to consider the evidence and to decide as they shall find the truth to be. *Gardner v. Pickett*, 19 Wend. 186.
  3. (*Matter not pertinent.*) Nor will a new trial be granted for matters suggested in a charge not pertinent to the case, unless the attention of the judge is at the time called to such suggestions and he refuses to explain. *Ib.*
  4. (*Irrelevant matter.*) A new trial will be granted where irrelevant testimony, which may have influenced the verdict of the jury, has been received on the trial. *Clark v. Vorce*, 19 Wend. 232.
  5. (*Same.*) A judge cannot be asked to instruct a jury upon a point not directly involved in the matter in controversy. *Ib.*
- ONUS PROBANDI. (*Marrying without consent.*)** In a *qui tam* action to recover the penalty provided in the statute against

marrying minors without the presence or consent of parent or guardian, the burden of the proof of consent falls on defendant. *Medlock v. Brown*, 4 Missouri, 379.

**PARENT AND CHILD.** (*Father guardian of infant children.*)

The father is the natural guardian of his infant children, and in the absence of ill-usage, grossly immoral principles or habits, or want of ability to provide for his children, is entitled to their custody, care and education; and cannot at common law be controlled by the courts in the exercise of his paternal rights, except as above, or for an abuse of the trust confided to him by law. *The People v. ———*, 19 Wend. 16.

**PARTNERSHIP.** (*Payment to.*) Though a debt due by one partner cannot be set off against a demand due to the partnership, yet when one is indebted to a partnership, and during the existence of it delivers flour, bacon, or other articles, to one of the partners, which it is understood between them shall be received in payment of the partnership demand, the debtor is discharged on the ground of payment; and the circumstance that the articles were applied to the individual use of the partner receiving them, does not vary the case. *M'Kee and another v. Stroup*, 1 Rice, 291.

2. (*Declarations.*) The declarations and admissions of parties, are sufficient evidence of a partnership, where the only testimony to rebut it is of a negative kind. *King v. Ham*, 4 Missouri, 275.

**PATENT RIGHTS.** (*Defective specification.*) A specification of an improvement, attached to letters patent for using and vending machines as inventions or improvements, merely describing certain parts of a machine without particularly showing in what the improvement consists, is defective, and renders the letters patent void *pro tanto*; and being void in part, they are void *in toto*. *Head v. Stevens*, 19 Wend. 411.

**PAYMENT.** (*How pleaded.*) In an action of covenant for non-payment of rent by an assignee against the lessee, a plea of payment to the lessor, to the assignees and owners, is not a good answer to the declaration. *Willard v. Tillman*, 19 Wend. 358.

**PLEAS AND PLEADINGS.** (*Pleas in abatement.*) To a plea in abatement it is not necessary to demur specially; formal defects may be urged under the general demurrer. *Shaw v. Dutcher*, 19 Wend. 216.

2. (*Same.*) If a plea in abatement be adjudged bad, the defendant is not allowed to attack the declaration. *Ib.*
3. (*Declaration.*) Where a party covenants to find the materials, and to do all the carpenter's and joiner's work, painting and glazing of a house according to a specified plan and specifications, and to complete the work by a given day, in an action against a third person who has become surety for the performance of the contract, the plaintiff must set forth in the declaration so much of the plan and specifications as is necessary to show in what particulars the builder has departed from or omitted to perform his contract, and allege such particulars as a breach of the contract. *Cooney v. Winants*, 19 Wend. 504.
4. (*Order accepted. Accord and satisfaction.*) A plea that the plaintiff accepted an order of the defendant on a third person for a given sum in satisfaction of the promises, is no bar to an action for the original cause of indebtedness; nor is a plea good as an accord and satisfaction, that the plaintiff agreed to accept the note of a third person, which on being tendered to him he refused to accept. *Hawley v. Foote*, 19 Wend. 516.
5. (*Non-joinder of secret partner.*) The non-joinder of a secret partner pleaded in abatement, verified by proof, is no bar to a recovery in an action by indorsees of a promissory note, unless knowledge of the partnership at the time of the transfer of the note be brought home to the plaintiffs. *New York Dry Dock Co. v. Treadwell*, 19 Wend. 525.

**PERJURY.** (*What.*) To constitute perjury, the party must knowingly, and wilfully, swear falsely as to some matter material to the issue. *Martin v. Miller*, 4 Missouri, 47.

2. (*In denying.*) If perjury was committed by the party in denying any matter, it is not perjury, the less because on cross-examination, or further examination, he confessed, or stated, the matter which he had before denied. *Ib.*

**PRINCIPAL AND AGENT.** (*Warranty by latter.*) The vendor of a negro slave, though he sell as the agent merely of the owner, and without any express warranty, is liable to the purchaser upon the implied warranty of soundness, where he has received notice of the unsoundness and the negro has been tendered back to him before he has paid over the purchase money to his principal; and in such a case, a count for money had and received will be sufficient. *Parkerson v. Dinkins*, 1 Rice, 185.

**PRINCIPAL AND SURETY.** (*Co-sureties.*) In the case of co-sureties, who pay the debt of their principal, the general rule is, that each must sue for the amount paid by himself; and if they were to join, their interest generally being several, they would fail. But, where the debt of the principal has been paid out of a joint fund, or by the joint credit of the sureties, then, the payment being a joint act and creating a joint interest, they may sustain an action against the principal, in their joint names. *Stewart & Cooper v. Vaughan*, 1 Rice, 33.

2. (*Same.*) Where co-sureties pay the debt of their principal, by their joint and several note, such payment is equivalent to a payment by a common fund or money belonging to both, and gives a joint right of action to both, against the principal, to recover over from him the amount so paid. *Ib.*

**REMAINDER.** (*In South Carolina.*) In South Carolina, as well as in England, a feoffment, with livery of seisin by the tenant for life of the legal estate, will bar all contingent remainders; and the rule is not modified by the circumstance, that the remainder man is an infant. *Redfern v. Ex'ors of Middleton*; *Same v. Hamilton*; *Kinloch v. Ex'ors of Middleton*; *Same v. Hamilton*; *Dehon v. Redfern*, 1 Rice, 459.

2. (*Same.*) A feoffment so made, together with a release of the right of entry and action by the person next entitled in remainder or reversion: Held, to be such a title as a purchaser is bound at law to accept. *Ib.*

**REPLEVIN.** (*In Missouri.*) Replevin will lie, although no trespass has been committed by the defendant in taking the

property. Replevin will lie, though there was no actual taking by any one, from the plaintiff. *Skinner v. Stouse*, 4 Missouri, 93.

2. (*Pleading.*) In justifying the taking of property by a sheriff under a writ of replevin, it must be averred that a bond for the return of the property was delivered with the writ to the officer. *Morris v. Van Voast*, 19 Wend. 283.

**SALE OF LANDS AND CHATTELS.** (*Deceit in.*) Deceit committed by the vendor in the sale of property, like any other fraud, may have the effect to discharge the vendee entirely or partially, from the payment of the consideration money. (*S. P. Adams v. Wylie*, 1 N. & M'Cord, 78.) *Johnson v. Wideman*, 1 Rice, 325.

2. (*Same.*) But damages arising from a deceit in the sale of property (*e. g.* a negro) cannot be set up by way of discount, in an action for the purchase money, so as to entitle the defendant to recover damages from the plaintiff. *Ib.*
3. (*Conditional.*) A verbal condition made on the transfer by delivery, of a personal chattel, under a contract of sale, that the right of property shall remain in the vendor or person transferring possession until the price agreed on be paid and not pass absolutely to the purchaser until then, is consistent with the rules of law, and will enable the vendor to maintain trover against an officer who sells the chattel, under process, as the property of the vendee in possession, at the suit of one who was a subsisting creditor of the vendee at the time of the transfer. (*O'Neill and Butler, J., dissenting.*) *Bennett v. Sims*, 1 Rice, 421.
4. (*Implied warranty.*) In the sale of hemp put up in bales, there is no implied warranty that the interior shall correspond in quality with the exterior of the bales; and if there be fraud, the vendor is not responsible in damages, unless it be shown that he was privy to it. *Salisbury v. Stainer*, 19 Wend. 159.
5. (*Same.*) Where the purchaser opens and examines one of several bales, and is at liberty to open others, but omits to do so, and the quality of the hemp in the bales not examined does not correspond with that opened, he is not permitted to allege that the sale was a sale by sample, or to contend that he is entitled to recover damages as on an implied warranty. *Ib.*

**SET-OFF.** (*Between distributees and administrators.*) Action by plaintiffs on joint note of defendants, given to them as administrators of A. Defendants pleaded in off-set their portions of the estate of A, which plaintiffs as such administrators had been ordered by the county court to pay each of them, as distributees of said estate. Held, (Judge Tompkins dissenting) to be a good plea. *Whaley & Blackwell v. M. & W. Cape*, 4 Missouri, 233.

2. (*Notes payable without defalcation.*) The provision in the statute of Missouri concerning off-sets, does not apply to a note which expresses to be "payable without defalcation." *Collins v. Waddle*, 4 Missouri, 452.

3. (*Assignment.*) Where an action is brought in the name of an assignor for the benefit of the assignee of a contract, (other than a negotiable promissory note or bill of exchange,) the defendant can set off only such demands as existed against the assignor, and in good faith belonged to the defendant, at the time of the assignment; demands subsequently acquired cannot be set off, although the defendant become the holder of them without notice of the assignment. *Mead v. Gillett*, 19 Wend. 397.

**SHERIFFS.** (*Sureties.*) The sureties of a sheriff are not responsible for money collected by him on an execution which came into his hands as a deputy of a former sheriff, although the money was in fact received subsequent to the time of their becoming sureties. *The People v. McHenry*, 19 Wend. 482.

**SHERIFF'S SALES.** (*Excuse for not selling.*) A sheriff advertises real and personal property to be sold under execution, during the session of the next circuit court for his county. The court, in consequence of excitement in the county, adjourned at an unusually early hour of the first day of its session. Held, a sufficient and legal excuse for the sheriff in not selling at that term. *Mitchell v. Gregg*, 4 Missouri, 37.

**SLANDER.** To say of a woman, she has gone down the river with two whores to a goosehorn, and is now there with them, is not actionable without a colloquium as to the kind of house or



place alluded to, and to which they had gone. *Quere* : are they actionable with the colloquium? *Dyer v. Morris*, 4 Missouri, 214.

2. (*Charging an impossible offence.*) Where a slanderous charge is made which the unlearned would understand as imputing a crime, the action of slander lies, although in the nature of things such crime could not have been committed; unless it be shown that the charge was made only in the hearing of those who knew that the crime could not be committed. *Kennedy v. Gifford*, 19 Wend. 296.
2. (*Defendant's conversation after suit.*) The *quo animo*, the words charged were spoken, may be shown by evidence of conversations of the defendant relating to the original defamation, had subsequent to the commencement of the suit. *Ib.*
3. (*Reports.*) Reports or public reputation of the truth of the slander, or of kindred charges, are inadmissible in evidence. *Ib.*

#### STATUTE OF FRAUDS. (*Improvements on public lands.*)

An improvement on the lands of the United States may be sold without writing, and is not affected by the statute of frauds. *Clark v. Shuller*, 4 Missouri, 235.

**STAY LAW.** The act of the legislature of Missouri directing a stay of execution on judgments obtained before justices of the peace is unconstitutional, both as it regards the constitution of Missouri and the United States. *Bungardner v. Circuit Court of Howard county*, 4 Missouri, 50.

**STREETS. (*Opinions.*)** The opinions of witnesses as to the value of property, taken for public improvement, are admissible in evidence; but such testimony is of the lightest kind and is received and acted upon with great caution. *In the matter of Pearl Street in the city of New York*, 19 Wend. 651.

2. (*Magna Charta.*) The true reading of the clause in magna charta that "no freeman shall be disseized of his freehold, &c., but by the law of the land," is, that no freeman shall be disseized, &c., except by due process of law. *In the matter of John and Cherry Streets*, 19 Wend. 659.

**TRESPASS QUARE CLAUSUM FREGIT. (*Possessory title.*)** If a person having a possessory title to land enters by

force, and turns out a person who has a naked possession only, the latter cannot maintain trespass against the person so entering under color of title; and if a person having a legal right of entry on land enters by force, though he may be indicted for a breach of the peace, yet he is not liable to a private action of trespass for damages, at the suit of the person who has no right and is turned out of possession. *Muldrow and another* ads. *Jones*, 1 Rice, 64.

2. (*Same.*) The action of trespass *quare clausum fregit* is the appropriate action for a violation of the plaintiff's possession of lands. If he be in the actual occupancy, he can maintain the action without title. If his possession be constructive only, and not actual, he cannot maintain it without proof of title. *Johnson v. M'Ilwain*, 1 Rice, 368.

3. (*Entry and ouster.*) Trespass lies for an entry upon land and an ouster of the plaintiff, but damages can be recovered only for the simple entry and ouster, and not for the continuance of the trespass. Damages for the continuance are not recoverable until after the plaintiff has regained possession by re-entry. *Holmes v. Seely*, 19 Wend. 507.

4. (*Owner not in possession.*) Trespass *quare clausum fregit* cannot be maintained by the owner of land against a third person, for passing and re-passing over the land whilst the premises are in the actual occupation of a tenant. *Ib.*

**TRIAL AND ITS INCIDENTS.** (*Default of one of several defendants.*) Where there are three defendants, one of whom suffers a default, and the others plead to issue, and on the trial prove payment of the plaintiff's demand, the jury have no right to assess the damages against the other defendant. *McClure v. Hall*, 19 Wend. 25.

**TROVER.** (*Change of property by.*) Independently of the act of 1827, in relation to the action of trover, the doctrine in South Carolina is well settled, "that a verdict for the plaintiff, in trover, changes the property and transfers the right to the defendant, and makes it liable to be taken in execution for his debts." *Rogers & Thompson v. Moore*, 1 Rice, 60.

2. (*Same.*) The leading case on this subject in South Carolina

is that of *Norrel v. Corley*, decided by the late court of appeals in December, 1828, (not reported,) in which the opinion of the court was delivered by the late Mr. Justice Nott. That was a case in chancery, where a bill was filed by the plaintiff in trover, who had recovered at law, to make the property which was the subject of the action liable to the plaintiff's recovery, in preference to other creditors. The court said, "by bringing an action of trover, the plaintiff trusts to the personal credit of the defendant, in the same manner as by taking a note or bond in payment of property sold: the property is changed, even though the money should never be recovered." *Ib.*

3. (*Lien.*) A party having a lien upon goods may transfer the possession subject to the lien to a third person, who may lawfully hold the property until the lien be paid; but if the transferee sell the goods, the owner is remitted to his original rights, freed from the lien, and may bring trover against him. The owner cannot, however, bring trespass, as the transferee came lawfully into possession by the delivery of the bailee. *Nash v. Mosher*, 19 Wend. 431.

**WARRANTY.** (*Title—Soundness.*) B. sold to S. a negro, and executed a bill of sale, in substance as follows: "For and in consideration of, &c., paid, &c., I have sold to S. a negro slave, sound in body and mind, and slave for life. I bind myself to warrant the title of said negro from all and every person. Held, to be a warranty as to title only, and a mere representation as to soundness. M'Girk, Judge, dissenting. *Soper v. Breckenridge*, 4 Missouri, 14.

2. (*Negligence.*) If a slave warranted sound be only slightly diseased, and come to its death by negligence or cruel treatment of the purchaser, the seller is not liable for the full value or price—but only to the extent of injury occasioned by the disease. *Ib.*
3. (*Construction of.*) In a bill of sale of a slave, the seller warranted the slave "from all vices and diseases prescribed by law." Held, that the words "prescribed by law" ought to be rejected, and that it is a contract against all vices and diseases. *Sloan v. Gibson*, 4 Missouri, 32.

4. (*Same.*) The warranty is against diseases existing at the time of making it. *Ib.*

WAY. (*Right of way.*) Where the owner of land sells and conveys a portion thereof which cannot be approached from a public highway, but over the remaining lands of the grantor, the grantee is entitled to a right of way over such remaining lands. The grantor, it seems, in such case, has the right to designate the track of the way, having a due regard to the rights of both parties; if he decline to exercise such right, the grantee may select for himself and will be supported in his selection unless chargeable with palpable abuse. The grantee is bound to keep the way in repair, and is not permitted to go *extra viam* as a traveller upon a public highway is allowed to do when the way is impassable, except, it seems, when the private way is temporarily or accidentally obstructed. *Holmes v. Seely*, 19 Wend. 507.

WILIS. (*Witness to, competency of.*) A legatee or devisee, who is also heir at law, is a competent witness to prove a fact to establish the will, under which he takes the legacy, when the establishment of the will is clearly against the interest he would have as heir. *Graham v. O'Fallon, executor*, 4 Missouri, 338.

2. (*Same.*) Whether a witness, who is both devisee and heir at law, is competent to establish a will, depends on the question, whether he will take more or less by the will than by the intestacy. *Graham and others v. O'Fallon, ex'r of Mullanphy*, 4 Missouri, 338.

3. (*Same.*) Hence, where the real estate is proved to be worth about \$2,250,000, and the share of witness, in case of intestacy, about \$285,000, whilst under the will he gets only \$50,000, and a remote contingent interest in an undivided share of the balance, which in no event would equal his share in case of intestacy, the interest of the witness is clearly against the establishment of the will, and he is a competent witness. *Ib.*

4. (*Attorney, confidential communication.*) An attorney who draws up a will, is present at the time of its execution—sees the will, after the death of the testator, in the possession of testator's family—reads it and recollects its principal provisions—is a

competent witness to prove those facts, and his evidence is not subject to the objection, that it discloses confidential communications of a client. *Ib.*

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### III.—MISCELLANEOUS CASES.

*In the High Court of Admiralty :—July 2, 1839.*

#### THE DE COCK.

Collision :—where both vessels are in fault.

The *Parmelia*, a British vessel, was proceeding up the channel, east and by north, and the *De Cock*, a foreign vessel, was coming down channel, her course being north-west. The wind was nearly south-west; therefore, the *Parmelia*, which was sailing on the starboard tack, had the wind free. The night was dark and hazy, and although a good look-out was kept on board both vessels, a collision took place. The question was, which party, if either, was to blame. It appeared that, as soon as the *Parmelia* descried the *De Cock*, she hailed her, and desired her to put her helm to starboard, but did nothing herself; the *De Cock* (according to the statement of her master), when hailed, instead of putting her helm to starboard, as asked to do, put it to port.

Dr. LUSHINGTON put the following questions to the two elder brethren of the Trinity House, by whom the court was assisted :—

First : “ Whether, under the circumstances of the case, the *Parmelia*, sailing up channel, with the wind free, ought not, immediately on perceiving the *De Cock*, to have given way ? ” Answer : “ She ought to have altered her course.”

Secondly : “ Then, suppose it was so, ought the *De Cock*, seeing this state of things, to have attempted to luff up, or have kept her course, or have put her helm to port as she did ? ” Answer : “ It was wrong to put her helm to port.”

The court held, upon these answers, that both vessels were to blame, and directed the amount of the damage done by the *De Cock* to be brought in and divided, and each party to pay their own expenses.

## LEGISLATION.

**VERMONT.** The legislature of Vermont, at the October session thereof for the year 1838, passed thirty-five general statutes, of which the following are some of the principal provisions.

*Trustee Process.* Persons, summoned as trustees in suits before justices of the peace, may have a trial of the question of their liability, before the return day of the process, upon shewing good cause therefor, and giving reasonable (being at least twenty-four hours) notice to the plaintiff. Chap. 5.

*Imprisonment for debt* is abolished in all cases of mesne process or execution issued on a judgment founded on any contract, express or implied, made or entered into, after the first day of January, 1839. Chap. 12.

*Wearing apparel*, belonging to the estate of a deceased intestate, shall descend to his widow, to be disposed of at her pleasure, and shall not be taken into the appraisal of the estate, or considered as assets. Chap. 18.

*Machinery, sale of.* 1. When any machinery, used in any factory, shop, or mill, shall be sold or mortgaged, the purchaser or mortgagee may cause the bill of sale or mortgage deed conveying such machinery, to be recorded in the town clerk's office of the town in which such factory, shop, or mill, shall be situated.

2. Such record shall have the same effect, as if the purchaser or mortgagee had taken possession of such machinery, at the time of making the record.

3. The bill of sale shall be sealed and witnessed by two witnesses, and acknowledged before a justice of the peace, like conveyances of real estate. Chap. 27.

NEW-HAMPSHIRE. Among the statutes of a public character, passed by the legislature of this state, at the last June session thereof, we find the following:

*Views in the trial of actions.* In all actions involving questions of right, as to real estate, the court of common pleas is authorized, on the motion of either party, to grant and order a view of the premises by the jury, upon such terms as the court may think equitable. Chap. 434.

*Students at literary institutions.* Chap. 447 provides, that, in all cases where individuals shall leave their home or place where they reside to attend an academy, college or other literary institution in any town or place in this state for the purpose of obtaining an education, that absence for such purpose shall not constitute a change of the place of residence of such individuals so as to cause them to be liable to be taxed, or do military duty, or to be entitled to vote in the town or place where such academy, college or literary institution is situated, but all such persons shall be subject to such liabilities, and entitled to such privileges in the town or place where they resided previous to such temporary absence for the purpose of obtaining an education, or in such other town or place to which they may have changed their residence during said time; provided, that this act shall not extend to or effect those individuals who shall have previously had their residence in the town or place where such academy, college or literary institution is situated, or who shall have during the time of obtaining such education removed to said town or place to take up their permanent residence therein.

*Divorces.* Chap. 457, entitled "an act in addition to an act to prevent incestuous marriages and to regulate divorces," provides that divorces from the bonds of matrimony shall be decreed in case the parties are within the degrees of consanguinity specified by the first section of the act to which this is in addition; or either of them had a former husband or wife alive at the time of solemnizing such second marriage, knowing them to be alive; or for impotency, for adultery in either of the parties, or where either of

the parties shall be absent for the space of three years together, and shall not be heard of, or for the cause of extreme cruelty in either of the parties, or when the husband shall willingly absent himself from the wife for the space of three years together, without making suitable provision for her support and maintenance ; or where either of the parties shall unnecessarily, without sufficient cause, and against the consent of the other, leave the other, or has heretofore left the other, and shall, unnecessarily and without sufficient cause refuse, or has heretofore refused to cohabit with the other for the space of three years together, it shall be deemed and taken to be a sufficient cause of divorce, provided such cause shall continue to exist at the time, when the petition for a divorce shall be filed.

MISSISSIPPI. The legislature of this state, at an adjourned session held in January and February last, passed one hundred and eighty-two acts and resolutions.

*Tippling houses and drunkenness.* "To suppress tippling houses, and to discourage and prevent the odious vice of drunkenness," it is enacted, among other things, that it shall not be lawful for any person to sell or retail any vinous or spirituous liquors in less quantities than one gallon, nor suffer the same or any part thereof, to be drank or used in or about his or her house. Chap. 20.

*Reporter of decisions.* The reporter of the decisions of the high court of errors and appeals is required to deposite in the office of the secretary of state, for the use of the state, four hundred copies of each volume of his reports, for which he is to be paid at the rate of eight dollars a page for as many pages as are contained in each volume of one copy. Chap. 31.

*Imprisonment for debt* is abolished in all cases, except in proceedings for contempts, actions on judgments on fines or penalties for crimes, misdemeanors, or offences, prosecuted in the name of the state, or on promises to marry, actions of slander, for money collected by any public officer or attorney at law, or for any misdemeanor or neglect in office or professional employment. Chap. 45, § 1.



The other sections of this act provide for the arrest of the body of the debtor, where the debt is one hundred dollars or upwards, and where the debtor is about to remove his property out of the jurisdiction, with intent to defraud his creditors, or to convert it into money to place it beyond their reach, or conceals property or rights of action, or has assigned his property to defraud creditors, or, lastly, fraudulently contracted the debt for which the suit is brought.

*Public defaulters.* The intentional, wilful, and fraudulent making of any false entry required to be made by law,—or conversion in any way whatever,—or use by way of investment in any kind of property or merchandize,—or the loaning with or without interest,—by the state treasurer, auditor of public accounts, assessors, collectors of taxes, or any other state or county officer, whose duty it is to receive, transfer or disburse any public moneys, securities, stocks or other public property,—of any portion of such money, securities, stocks, or other property so entrusted to such officer,—is declared to be an embezzlement of the same, and punishable by imprisonment in the penitentiary for not less than one year or more than five years, and a fine equal to the amount embezzled. Chap. 52.

*Chancery.* An amendment to the constitution, authorizing the establishment of a court of chancery, with full jurisdiction in all matters of equity, the chancellor to be not less than thirty years old, and elected by the qualified electors of the whole state, is proposed by chap. 60. This amendment is to be submitted to the people, and if sanctioned by a majority of the electors, voting thereon, will become a part of the constitution.

*Crimes and punishments.* The whole penal code, including proceedings in criminal cases, and prison discipline, is consolidated and arranged in one statute. Chap. 66.

**MISSOURI.** The tenth general assembly of this state, at its first session, held in November, 1838, passed a great number of public and private acts and resolutions, which are arranged alphabetically in separate divisions.

**Boats and vessels.** A lien on boats and vessels used in navigating the waters of the state of Missouri, is established in the following cases :

1. For all wages due to the hands or persons employed on board of the same, on account of work done, or services rendered on board of such boat or vessel.

2. For all debts contracted by the master, owner, agent, or consignee of such boat or vessel, on account of stores and supplies furnished for the use thereof.

3. For all materials furnished, and labor done by mechanics, tradesmen and others, in the building, repairing, fitting out, furnishing and equipping such boat or vessel.

4. For all sums due for the wharfage or anchorage of such boat or vessel ; for all demands or damage, accruing from the non-performance or mal-performance of any contract of affreightment, or of any contract concerning the transportation of persons or property, entered into by the master, owner, agent, or consignee of such boat or vessel, and for all injuries done to person or property by such boat or vessel.

**Jury trials.** Hereafter it shall not be lawful for any court or judge, in any case of jury trial, to sum up or comment on the evidence, or give to the jury any charge or instruction on any question of law or fact, except it be in writing and filed in the cause ; unless both parties consent that it be done orally ; provided, that in no criminal case, shall the instructions be oral.

**General laws.** The secretary of state is authorized and required to publish five hundred copies of the following described laws :

1. All the laws enacted by the governor and judges of the territory of Indiana, relative to the district of Louisiana ;

2. All the laws enacted by the governor and judges of the territory of Louisiana ;

3. All the laws enacted by the general assembly of the territory of Missouri, and by the general assembly of the state of Missouri, up to the year eighteen hundred and twenty-five ; and

4. All the laws enacted by the general assembly of the state of

Missouri passed between 1825 and 1835, and not published in the digests of those years.

*Schools.* The organization, support, and government of the common schools, is provided for by an act, containing six articles, the titles of which are as follow: 1. Of common shool funds and the care and management thereof: 2. Of county and township school funds, and the powers and duties of county officers: 3. Of the organization of school townships, and of the choice, powers, and duties of their officers: 4. Of the organization and government of school districts: 5. Of school corporations in towns and villages: and 6. Miscellaneous provisions.

We shall not have a better opportunity than the present, to express our decided approbation of the style of the statutory legislation of Missouri. It is superior, in the points of precision, neatness, and perspicuity, to the legislation of most of the other states in the union. The manner, in which the laws are published, is equally commendable.

OHIO. The thirty-seventh general assembly of Ohio, at its first session commencing Dec. 3, 1838, passed a great number of general and private laws and resolutions.

*Fugitives from labor or service from other states.* The mode of proceeding in the cases provided for by the federal constitution is regulated by an act passed Feb. 26, 1839.

Among other provisions, the statute declares it to be the duty of all officers proceeding under the same to recognise, without proof, the existence of slavery or involuntary servitude in the several states of the union, in which the same may exist or be recognised by law.

*Leasehold estates.* Permanent leasehold estates, renewable for ever, are made subject to the same law of descent and distribution as estates in fee are or may be subject to.

*Divorce.* Imprisonment in the penetentiary of the state, or of any other state, or of the United States, for any crime, punishable by the laws of Ohio, is made good cause of divorce.

*Imprisonment for debt.* The following causes, in addition to

those provided by the existing law, authorize the imprisonment of a debtor, namely: 1. Where he is about to remove his body out of the jurisdiction of the court: 2, where he has converted his property into money for the purpose of placing it beyond the reach of his creditors: and 3, where he is not a citizen or resident of the state.

*Embezzlement.* This offence, committed by the clerk or servant of any private person or co-partnership, or by any officer, agent, clerk or servant of any incorporated company, is made punishable, in the same manner, as a larceny of property of the same value.

## CRITICAL NOTICES.

- 1.—*A Law Dictionary adapted to the Constitution and Laws of the United States of America, and of the several states of the American Union ; with references to the Civil and other Systems of Foreign Law.* By JOHN BOUVIER. In two volumes. Philadelphia : T. & J. W. Johnson, 1839.

We cannot make this work known to our readers in any better manner than by republishing the author's preface.

“ To the difficulties which the author experienced on his admission to the bar, the present publication is to be attributed. His endeavors to get forward in his profession were constantly obstructed, and his efforts for a long time frustrated, for want of that knowledge which his elder brethren of the bar seemed to possess, To find among the reports and the various treatises on the law the object of his inquiry, was a difficult task ; he was in a labyrinth without a guide, and much of the time which was spent in finding his way out, might, with the friendly assistance of one who was acquainted with the construction of the edifice, have been saved, and more profitably employed. He applied to law dictionaries and digests within his reach, in the hope of being directed to the source whence they derived their learning, but he was too often disappointed ; they seldom pointed out the authorities where the object of his inquiry might be found. It is true, such works contain a great mass of information, but from the manner in which they have been compiled, they sometimes embarrassed him more than if he had not consulted them. They were written for another country possessing laws different from our own, and it became a

question how far they were or were not applicable here. Besides, most of the matter in the English law dictionaries will be found to have been written while the feudal law was in its full vigor, and not fitted to the present times, or calculated for present use, even in England. And there is a great portion, which, though useful to an English lawyer, is almost useless to the American student. What, for example, have we to do with those laws of Great Britain which relate to the person of their king, their nobility, their clergy, their navy, their army; with their game laws; their local statutes, such as regulate their banks, their canals, their exchequer, their marriages, their births, their burials, their beer and ale houses, and a variety of similar subjects?

“The most modern law dictionaries are compilations from the more ancient, with some modifications and alterations; and, in many instances, they are servile copies, without the slightest alteration. In the mean time the law has undergone a great change. Formerly the principal object of the law seemed to be to regulate real property, in all its various artificial modifications, while little or no attention was bestowed upon the rules which govern personal property and rights. The mercantile law has since arisen, like a bright pyramid, amid the gloom of the feudal law, and is now far more important in practice, than that which refers to real estate. The law of real property, too, has changed, particularly in this country.

“The English law dictionaries would be very unsatisfactory guides, even in pointing out where the laws relating to the acquisition and transfer of real estate, or the laws of descent in the United States, are to be found. And the student who seeks to find in the dictionaries of Cowell, Manley, Jacobs, Tomlins, Cunningham, Burn, Montefiore, Pott, Whishaw, Willams, the *Termes de la Ley*, or any similar compilation, any satisfactory account in relation to international law, to trade and commerce, to maritime law, to medical jurisprudence, or to natural law, will probably not be fully gratified. He cannot, of course, expect to find in them any thing in relation to our government, our constitutions, or our political or civil institutions.

“ It occurred to the author that a law dictionary, written entirely anew, and calculated to remedy these defects, would be useful to the profession. Probably overrating his strength, he resolved to undertake the task, and if he should not fully succeed, he will have the consolation to know, that his effort may induce some more gifted individual, and better qualified by his learning, to undertake such a task, and to render the American bar an important service. Upon an examination of the constitution and laws of the United States, and of the several states of the American union, he perceived many technical expressions and much valuable information which he would be able to incorporate in his work. Many of these laws, although local in their nature, will be found useful to every lawyer, particularly those engaged in mercantile practice. As instances of such laws, the reader is referred to the articles, Acknowledgment, Descent, Divorce, Letters of Administration, and Limitation. It is within the plan of this work, to explain such technical expressions as relate to the legislative, executive, or judicial departments of the government ; the political and the civil rights and duties of the citizens ; the rights and duties of persons, particularly such as are peculiar to our institutions, as, the rights of descent and administration ; of the mode of acquiring and transferring property ; to the criminal law, and its administration. It has also been an object with the author, to embody in his work such decisions of the courts as appeared to him to be important, either because they differed from former judgments, or because they related to some point which was before either obscure or unsettled. He does not profess to have examined or even referred to all the American cases ; it is a part of the plan, however, to refer to authorities generally, which will lead the student to nearly all the cases.

“ The author was induced to believe, that an occasional comparison of the civil, canon, and other systems of foreign law, would be useful to the profession, and illustrate many articles, which, without such aid, would not appear very clear ; and also to introduce many terms from foreign laws, which may supply a defi-

ciency in our own. The articles Condonation, Extradiction and Novation, are of this sort. He was induced to adopt this course, because the civil law has been considered, perhaps not without justice, the best system of written reason, and as all laws are or ought to be founded in reason, it seemed peculiarly proper to have recourse to this fountain of wisdom : but another motive influenced this decision ; one of the states of the union derives most of its civil regulations from the civil law ; and there seemed a peculiar propriety, therefore, in introducing it into an American law dictionary. He also had the example of a Story, a Kent, Mr. Angell, and others, who have ornamented their works from the same source. And he here takes the opportunity to acknowledge the benefits which he has derived from the learned labors of these gentlemen, and of those of judge Sergeant, judge Swift, judge Gould, Mr. Rawle, and other writers on American law and jurisprudence.

“ In the execution of his plan, the author has, in the first place, defined and explained the various words and phrases, by giving their most enlarged meaning, and then all the shades of signification of which they are susceptible ; secondly, he has divided the subject in the manner which to him appeared the most natural, and laid down such principles and rules as belong to it ; in these cases he has generally been careful to give an illustration, by citing a case whenever the subject seemed to require it, and referring to others supporting the same point ; thirdly, whenever the article admitted of it, he has compared it with the laws of other countries within his reach, and pointed out their concord or disagreement ; and, fourthly, he has referred to the authorities, the abridgments, digests, and the ancient and modern treatises, where the subject is to be found, in order to facilitate the researches of the student. He desires not to be understood as professing to cite cases always exactly in point ; on the contrary, in many instances the authorities will probably be found to be but distantly connected with the subject under examination, but still connected with it, and they have been added in order to lead the student to matter of which he may possibly be in pursuit.



"At the suggestion of a judicious friend, in order to make this work as complete as possible, and useful to the inquiring practitioner, as well as to the student, an appendix has been added, containing Kelham's Norman Law Dictionary.

"To those who are aware of the difficulties of the task, the author deems it unnecessary to make any apology for the imperfections which may be found in the work. His object has been to be useful; if that has been accomplished in any degree, he will be amply rewarded for his labor; and he relies upon the generous liberality of the members of the profession to overlook the errors which may have been committed in his endeavors to serve them."

Our readers will perceive, from the foregoing remarks of the author, that he entertains a just notion of the importance of an American Law Dictionary, and of the difficulty of compiling such a work. We think, too, that his plan is a good one; but, with what fidelity and success he has executed it, we have not examined the work with sufficient accuracy and attention to determine. Several of the titles, which we have looked at, are well done; some, we should think, but imperfectly; others, again, which are new in works of this kind, are properly selected and cannot fail to be useful. To the latter class belong the articles on Abbreviations, in which the abbreviated titles of a great number of law books are explained, and on Construction, in which references are given to reported cases and other sources of information, for the explanation of many phrases and expressions occurring in deeds, wills, and other instruments. Our author has done so much, in this novel undertaking, and has done his work so well, that we feel little inclination to criticise his labors, and none at all to treat them with severity: still, we will venture two suggestions for his consideration, when he comes to publish a second edition, which we have no doubt will soon be called for. In the first place, the mechanical part, so to speak, of his style, might be improved in point of neatness. Take, for example, the following instances:

"BLOOD, *kindred*, a red fluid in man and many other animals, distribu-

ting the nutritive principles to every texture, and the source of every secretion. It is taken in law figuratively for *stock* or family."

"BODY POLITIC, *government, corporations*, when applied to the government, this phrase signifies the *state*, when it is passive; *sovereign*, when it is active; *power*, when compared to its equal."

We have not given the whole of these titles; but we have extracted enough to show our meaning. It strikes us that the language might be much improved. In the second place, our author has not in all instances had recourse to the best and latest works; thus, under the head of insanity, instead of giving the definitions of Dr. Ray, in his late excellent work on the Medical Jurisprudence of Insanity (which, by the way, he does not refer to at all), he tells us, that "insanity is a continued impetuosity of thought, which *totally* unfits a man for judging and acting with the composure requisite for the maintenance of the social relations of life;" adding, that "the subject is not perhaps susceptible of any satisfactory definition, which shall, with precision, include all cases of insanity, and exclude all others." We noticed other examples of the same kind, in the author's explanation of terms of the Roman law.

2.—*Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisprudence, with occasional illustrations from the Civil and Foreign Law.* By JOSEPH STORY, LL. D., Dane Professor of Law in Harvard University. Boston: Charles C. Little and James Brown, 1839.

The subject of agency is one of the most important branches of mercantile law, and is growing more and more so, as the various parts of the commercial world are brought into a more and more close union by the help of rail-car and steam-ship. As it is one of the most important branches of mercantile law, so it is one of the most artificial and elaborate, abounding in nice distinctions and in verbal refinements, and swarming with cases which no amount of ingenuity can reconcile. In no branch of the law, has a stronger effort been made to bend inflexible principles to the exigencies of the particular case in hand. A rule has been one day tightened

to punish a dishonest agent, and another day relaxed, to save harmless one who has been unlucky and well meaning. In one case, the court struggles in favor of a creditor who has given credit to some committee or board of management, and in another extends its protecting shield over the representative functionary himself. The whole subject of the liabilities of agents, with its shadowy distinctions between misfeasance and non-feasance, the "*causa causans*" and the "*causa sine qua non*," is "perplexed in the extreme," and before we can shape a fair course, we must make jettison of some adjudged cases.

The profession has been in want of a treatise upon this subject, commensurate with its claims and embracing the recent decisions. Paley's work was a meagre and superficial performance, and in the recent editions, so overloaded with annotations to supply deficiencies in the text and to bring down the law to a later period, as to be an uncomfortable book to consult or study. Mr. Livermore's treatise is a work of more vigor and learning, but has been too long published to serve as a book of reference at the present time. Mr. Chancellor Kent's chapter on agency is an admirable summary, but, of course, is not and does not profess to be any thing more than a summary. Mr. Justice Story, in his valuable treatise has supplied every deficiency and left nothing to be desired by the practitioner or student. We know not by what process it is, that in the midst of his various judicial and professional labors, he finds time to write so many elaborate and learned works, the composition of which alone would seem to be enough for one person. Lockhart, in his life of Scott, says that at one period of his life, a stranger in Edinburgh would have supposed that there were two persons in that city named Walter Scott, one the indefatigable author, and the other, some worthy and popular citizen, who had a great turn for presiding at public dinners, being chairman of public meetings and president of societies, &c. In like manner, we are sometimes inclined to think that there must be two persons with the name of Story, one, the judge of the first circuit, and the other, the Dane professor of law in Harvard University; one delivering opinions and the other writing books, so

difficult do we find it to realize that it is one and the same individual who performs all these various and manifold labors.

The first four chapters are devoted to a consideration of the definition of agency, of the persons who are capable of sustaining the relation of principals and agents, the distinction between general and special agents, the different kinds of agents including auctioneers, brokers, factors, ships' husbands and masters of ships, and a consideration of the cases where there are two or more principals and two or more agents. The fifth chapter treats of the appointment of agents; the sixth, of the extent of their authority, and the seventh, of their duties and obligations. These two last are highly valuable chapters, overflowing with learning and marked throughout by the application of a searching and accurate legal discrimination to the nice distinctions of this branch of the subject. In the eighth and ninth chapters are discussed the liabilities of agents to their principals and their defences against them. The tenth, eleventh and twelfth chapters are occupied with a full and thorough examination of the liabilities of agents, public and private, to third persons, on contracts and for torts. The thirteenth and fourteenth chapters investigate the rights of agents in regard to their principals and their right of lien, which is very fully discussed. The subject of the fifteenth chapter is the rights of agents in regard to third person. The sixteenth and seventeenth chapters are given to a discussion of the reciprocal rights of principals and third persons, and the eighteenth, the concluding chapter, to the dissolution of agency. The whole work is marked with that ample and redundant learning and vigorous good sense, which have given his previous legal writings so high an authority both in England and America. He has every where illustrated the doctrines of the common law by copious extracts from distinguished writers on Roman and continental law, and shewn us how inevitably the exigences of commerce, and the sense which intelligent merchants have of their own true interests, lead to the same principles in commercial law in England, Scotland, France, and America. The following is the paragraph with which the work concludes.

"Here these commentaries upon the law of agency are brought to their natural close. Upon reviewing the whole subject, it cannot escape the observation of the diligent reader, how many of the general principles, which regulate it, are common to the Roman law, to the law of continental Europe and Scotland, and to the commercial jurisprudence of England. To the latter, however, we are indebted, not only for the fullest and most comprehensive exposition of these principles, but for the most varied and admirable adaptations of them to the daily business of human life. It is, indeed, to be numbered among the proudest achievements of England, that, while the peculiar doctrines of her own common law have been cultivated and illustrated by her lawyers, and administered by her judges, with a sagacity and learning and ability rarely equalled and never excelled, Westminster hall has promulgated the more enlarged and liberal principles of her commercial jurisprudence with a practical wisdom and enlightened policy, which have commanded the respect of the world, and silently obtained for it an authority and influence, more enviable and more extensive, even than those acquired by her arts or her arms."

3.—*An Argument in favor of the Constitutionality of the General Banking Law of this State, delivered before the Supreme Court, at the July Term, 1839.* By SAMUEL A. FOOT, of the city of New York, counsellor at law. Geneva: Ira Merrell, Printer, Seneca Street, 1839.

This argument was delivered in the case of Anson Thomas, president of the bank of Central New York, against Samuel D. Dakin, which was an action of assumpsit on three drafts for five thousand dollars, drawn by the defendant and indorsed to the plaintiff. The drafts being dishonored were protested for nonpayment, and this suit was instituted by the president of the bank to enforce their collection. The defendant demurred to the declaration. The question raised on the pleadings was, whether "an act to authorize the business of banking," passed by the legislature of New York, April 18, 1838, and usually called the "general banking law," and under which the association of which the plaintiff was president was organized, was constitutional.

The case was argued at Utica, before the supreme court, on

the 22d, 23d, and 24th days of July, 1839, by Ward Hunt, Esq. for the defendant, and by Messrs C. P. Kirkland, and Samuel A. Foot, for the plaintiff. The pamphlet before us contains the argument of the last named gentleman, written out at length by himself. The following propositions were maintained by Mr. Foot, in his argument.

“*First.* The associations authorized by the statute and organized under it are not corporations; and, consequently, the clause in the constitution of New York, which restricts the power of the legislature in creating bodies corporate, does not apply to it.

“*Second.* But admitting that the associations are corporations, still this statute is constitutional; because, the restrictive clause of the constitution does not prohibit the legislature from passing a law, authorizing an indefinite and unlimited number of corporations; or, in other words, does not apply to a general act of incorporation; and, consequently, the legislature may now provide, by a general law, for the incorporation of an unlimited number of voluntary associations; as it could and did, in many instances, before the adoption of the present constitution.

“*Third.* Admitting that the constitutional restriction does apply to a general act of incorporation; nevertheless, such an act may be passed by a two-thirds vote; and the statute in question, having passed through the regular forms of authentication, and appearing on the statute book, must be presumed to have been passed by the requisite constitutional vote.”

We have only to add, that the argument in support of these propositions is able, learned, and thorough, and seems to us to establish them on a firm and sure foundation.

4—*Statutes of the Territory of Wisconsin, passed by the legislative assembly thereof, at a session commencing in November 1838, and at an adjourned session commencing in January 1839.* Published by authority of the legislative assembly. Albany, N. Y.: Printed by Packard, Van Benthuysen & Co. 1839.

The legislative assembly of Wisconsin, by a resolution passed in December 1838, appointed Messrs. Morgan L. Martin, Marshall M. Strong, and James Collins, of the council, and Messrs. Edward

V. Whiton, B. Shackelford, and Augustus Story, of the house of representatives, a committee to revise the laws of the territory, and to report the result of their labors at an adjourned session. During the recess, which continued only thirty days, the committee prepared numerous bills, which were passed at the next session, and compose the principal part of the laws contained in this volume.

Mr. Whiton, one of the committee, was directed by the legislative assembly to procure these laws to be printed, with marginal notes and an index. He seems to have performed this duty with much fidelity. The volume contains also the constitution of the United States, and the several acts of congress relating to the territory of Wisconsin.

The style of these laws is good,—better than that of statutory legislation in general,—and does credit to the revising committee. As a collection of laws, this volume is far from perfect; though not less so perhaps than the statute laws of other states.

5.—*Reports of Cases argued and determined in the District Court of the United States for the District of Maine. 1822—1839.*  
Portland: Colman and Chisholm, 1839.

The readers of the Jurist, who have been occasionally favored with the opinions of the learned judge of the district court of Maine, will be rejoiced to learn, that the decisions of that most respectable court have been presented to the profession in a permanent form. The volume before us contains the decisions of judge Ware from 1822 to 1839, inclusive, chiefly in matters of admiralty. Of the merit of these decisions, it is unnecessary to say any thing to the readers of this journal; but to those of the profession, who are not already acquainted with their character, we will say, without hesitation, that they are not inferior in learning or logic to those of any court in this country. In points of admiralty practice, these reports will be found peculiarly valuable. If there is any thing to complain of in this volume, it is the author's modesty in withholding his name from the title; though, in both capacities, as reporter and judge, he has every reason to be proud of his work.

6.—*The most important Parts of Blackstone's Commentaries reduced to Questions and Answers.* By ASA KINNE. Second Edition. New York : 1839.

7.—*The most important Parts of Kent's Commentaries, reduced to Questions and Answers.* By ASA KINNE. New York : 1839.

In a recent number of our journal, we expressed an opinion of the first of the above works, that it would be found useful to the profession generally as well as to the student ; and this opinion, though founded in a very imperfect and hasty examination, seems to be verified by the fact, that a second edition of the work has so soon become necessary.

In a succeeding number, a correspondent reproaches Mr. Kinne with having appropriated Field's Analysis of Blackstone to his own use ; and, having given publicity to this charge, it is but fair on our part, to let our readers hear what Mr. Kinne has to say in relation to it. He says, in the preface to his second edition, that,

"It was not until the author had progressed for some time with his compilation, that he was aware that 'Judge [?] Field's Analysis' ever existed ; but, in the progress of his studies, a copy of that admirable work fell accidentally into his possession, and was of much assistance in lessening his labors ;—and, although the production of judge Field did not give rise to this compilation, the author deems it but an act of justice to that useful man, that this circumstance should be mentioned."

This edition contains what the author denominates an index to the Greek, Latin, French, Italian, and Saxon phrases, used in the work, with the translations in English ; but, though we have made diligent search therefor, we have been wholly unable to find any phrases in Greek, Italian, or Saxon. Many of the translated words are misspelt, and some of them are not very accurately rendered into English.

In the second of the above named works, Mr. Kinne has *reduced* Kent's commentaries in the same manner that he had before done Blackstone's ; but, with what skill or success, we have not examined the work sufficiently to determine.



8.—*Precedents in Pleading: with copious notes of Practice, Pleading and Evidence.* By JOSEPH CHITTY, Jr., Esq. of the Middle Temple. In two volumes. Springfield: G. & C. Merriam, 1839.

In consequence of the death of Mr. Joseph Chitty jr., the second volume of this work, although mainly prepared by him, appeared under the editorial supervision of Messrs. Henry Pearson and Tompson Chitty. It is intended to adapt the old forms to the new rules on pleading promulgated by the judges, and which have effected so extensive a reform in the old science of special pleading in England. We had some doubts, at first, whether these revised and improved forms could be of much use in this country; but, upon further consideration, we are inclined to believe, that they will be found equally serviceable with those of the old books, even in those states where special pleading has been abolished. The facts in a case must be stated in some form or other, corresponding with their legal effect, whether the system of pleading be abolished or not; and the forms contained in the volumes before us, being purified from all extraneous matter, and very much simplified, must, consequently, afford much information and instruction in regard to the proper manner of their statement, under any system. In those of the states, where the system of pleading has been modified somewhat in the same manner as it has been in England by means of the new rules, these volumes will be eminently valuable and useful, and in others they will still be of some service. The forms of declarations, which cannot be dispensed with under any system, will be found, if we are not much mistaken, a very great improvement upon the ancient forms, and a very acceptable addition to our present stock. The notes are copious and valuable. The publishers have certainly run some risk in reprinting this work. We hope they will not be disappointed in their expectation of a sale.

9.—*Penal Code of Rhode Island* [in the Laws of 1838.]

The report of the commissioners appointed to revise the penal

code of Rhode Island, and to adapt it to a system of penitentiary punishments, which we noticed in a former number, has since been acted upon by the general assembly of the state, and became the law thereof on the fifteenth day of May, 1838. We perceive very little difference between the report and the law. The punishment of death is provided only in case of murder. This law makes no pretension to be a complete code. It is merely a revision of the previously existing statute law, with some additions and many improvements ; but it leaves the definitions of offences in many if not in most instances to the common law ; and it contains, besides, a provision for the punishment of all offences at common law, which are not made punishable by the act. This last principle we hope will not be adopted by other states, in the revisions of their criminal law. If any thing ought to be certain, it is the definition of crimes.

#### 10.—*Penal Code of Mississippi* [in the laws of 1839.]

The criminal laws of this state were revised and consolidated in one statute, by an act concerning "crimes and punishments and the penitentiary," passed February 15, 1839. This act is divided into nine titles, namely : 1, of the rights of persons, who are accused of crimes and offences ; 2, of crimes punishable with death ; 3, of offences against the persons of individuals, punishable by imprisonment in the penitentiary ; 4, of offences against property punishable by imprisonment in the penitentiary ; 5, of offences affecting the administration of justice, punishable by imprisonment in the penitentiary ; 6, of offences against the right of suffrage ; 7, of offences against the public morals, and other miscellaneous offences, punishable by imprisonment in the penitentiary ; 8, of offences punishable by imprisonment in a county jail and by fines ; 9, general provisions concerning crimes and their punishment. The punishment of death is retained only in the three offences of treason, murder, and arson in the first degree. This code contains a greater number of definitions, and, consequently, is much more complete, than some other recent revisions. As a legislative work, it is deserving of praise. The criminal code of

Mississippi makes a part of the statutes of that state, which have been recently revised by judge Pray, but which have not as yet been adopted as a whole.

- 11.—*The American Conveyancer ; containing a large variety of legal forms and instruments, adapted to popular wants and professional use throughout the United States, together with forms and directions for applicants under the patent laws of the United States and the insolvent act of Massachusetts.* By GEORGE T. CURTIS, of the Boston Bar. Boston : Charles C. Little and James Brown, 1839.

This is a valuable collection of forms, adapted both to professional and popular use, and expressed in concise and intelligible terms. Most of the forms heretofore used are encumbered with a multitude of words. Where a form is printed, with blanks to be filled up, it seems easy to ensure its validity, by inserting all that can in any event be necessary ; and, thus, some of our most common forms have become exceedingly wordy. We are happy to say, that Mr. Curtis seems to have hit the happy medium ; his forms are concise without being obscure or imperfect, and full without being confused or redundant.

- 12.—*The Practice in the Courts of Law and Equity in Virginia.* By CONWAY ROBINSON. Vol. III. Containing practice in criminal causes ; in cases before courts of probate ; and in other cases wherein appeals are demandable of right, such as mills, roads, and the like. Richmond : Smith & Palmer, 1839.

We need say nothing to commend Mr. Robinson's third volume to the profession. The merits of the preceding volumes are so well understood and appreciated, not in Virginia alone, but in many other states, that we have no doubt this will be received with equal interest, and be as extensively circulated, as its predecessors. The author's preface will serve better than any thing we can say, to point out his views, and to give our readers an idea of the contents of his book :

“ After publishing my two former volumes, one embracing the

practice in courts of law in civil cases, and the other the practice in suits in equity, I felt a strong desire to make the work more complete by the addition of a third volume upon the practice in other cases. It happened, however, that in the summer following the publication of the second volume, I was induced to accept an office, which, though my friends thought it would not interfere in any great degree with my profession, proved nevertheless one of so much labor, and involving so much responsibility and consequent anxiety, as to make it impossible for me while I held it, to carry out any such design as that which I have intimated. My resignation of that office during the last autumn has permitted me since to pursue my profession as actively as ever, and has also enabled me to employ the vacation of the court of appeals, in the composition of this volume.

“In preparing it, I have as heretofore generally avoided making use of the contents of English publications. The writer of an American law book seems to me to perform a more valuable service, in turning to account the materials which our country affords. Upon almost every matter, the English decisions are collected in some work which treats of the particular subject. But it is otherwise, in regard to the American adjudications. We want these adjudications, and especially those of the state in which we live, collected together, systematically arranged and commented upon and explained, where comment and explanation seem desirable.

“Having early determined to cite no case until I had myself first examined it, the references to American reports are to such as my own library affords, embracing the decisions of the state courts of Massachusetts, New York, Pennsylvania, Maryland, Virginia and South Carolina, and those of the supreme and circuit courts of the United States. To all of these, and to the statutes of Virginia, resort has been had in preparing the book upon the practice in criminal causes, and that upon the practice in cases before courts of probate. These books will afford, it is believed, material aid to a lawyer in any part of the United States. The peculiar nature of the subject embraced by the latter makes the remark applicable to that, even in a greater degree than to the

former. For, in consequence of the great intercourse which prevails between citizens of different states in our confederacy, it frequently happens, that individuals dying in one state are entitled to real property in another, which is to be disposed of by the laws of the state in which such property is situate ; or, that individuals domiciled in one state at the time of their death, are entitled to personal property in another, which is to be disposed of by the laws of the state of the domicile.

“ The remaining book contains references to the statutes and decisions of Virginia in relation to controversies concerning the appointing, displacing and controlling guardians of infants and committees of persons of unsound mind ; and also concerning mills, roads and the like. These subjects, though not perhaps of equal interest with the others treated of in the volume, were proper to be embraced in it, in order to give completeness to the work as a treatise upon the practice in the courts of Virginia.”

13.—*Reports of Cases at Law, argued and determined in the Court of Appeals and Court of Errors of South Carolina, from December, 1838, to May, 1839, both inclusive.* By WILLIAM RICE, State Reporter. Vol. I. Charleston : Burgess & James, 1839.

The author's preface contains the following account of the judiciary of South Carolina :

“ As the court of errors is of recent origin, it may not be out of place to give some explanation of its organization and authority. It may be necessary to the information of the professional reader, out of this state (if there should be any), to remark, that there are two separate and independent tribunals in this state, one of law and one of equity : that in each department the judges, when convened, constitute a court of appeals, in which all cases are finally determined, those of law in the law court of appeals, and those of equity in the court of appeals in equity. To prevent, however, any clashing in the decisions of the two courts, upon principles common to both, to insure entire uniformity and consistency in the interpretation of the laws, as well as to secure in important cases a more learned and intelligent tribunal than either of the courts of appeals would separately afford, it is provided by an act of the

legislature of 1836, p. 40, (among other things,) "that upon all constitutional questions arising out of the constitution of this state or of the United States, an appeal shall lie to the whole of the judges assembled to hear such appeals; that an appeal shall also lie to the whole of the judges upon all questions upon which either of the courts of appeals shall be divided, or when any two of the judges of the court shall require that a cause be further heard by all the judges." Thus it is seen, that the court of errors, in this state, the highest legal tribunal, and the one of last resort in any case, is composed of the equity and law judges united in one body, and brings to the ultimate and final decision of important questions all the judicial learning and experience of the state. Its decisions, therefore, are not only of paramount authority with us, but when regard is had to the number and character of the judges who compose the court, it might be supposed to present a legal tribunal which would not suffer in comparison with any other in this country."

This volume contains the decisions of the law court of appeals, from December term, 1838, to May term, 1839, and the decisions of the court of errors, during the same period, of cases brought into that court from the courts of law. The decisions of the court of appeals in equity and of equity cases in the court of errors, during the same period, are to be published in a separate volume.

The reporter explains the duties of his office, as prescribed by law, very fully in his preface. He is required to publish the decisions only, and not the arguments of counsel; and the decisions are to be selected by the judges. From the examination, which we have been able to give this volume, we are inclined to think favorably of the qualifications of Mr. Rice for the duties of reporter. Many of the cases are valuable, and will be found interesting beyond the limits of the state. The volume contains obituary notices of Elihu Hall Bay, a judge of the court of common pleas and sessions, for nearly half a century, and of Charles Jones Colcock, for many years a judge of the same court and of the court of appeals. The forthcoming volume of chancery reports will contain a like notice of the late chancellor Dessausure. Our readers will find some of the cases in this volume inserted in the Digest of American Reports, for the present number.

- 14.—*Revue de Législation et de Jurisprudence*, publiée sous la direction de M. L. WOŁOWSKI, avocat à la cour royale de Paris, professeur de législation industrielle au Conservatoire des Arts et Metiers. Cinquième Année. Tome X. 5e Livraison. Paris, 30 Septembre, 1839.

The eleventh volume of this excellent periodical will commence with the present month, January, 1840. We are glad to perceive, that the learned director has received the appointment of professor of industrial law in the Conservatory of Arts and Trades, and will commence his course the present month. This course comprehends law in its application to industry ; and the professor will treat of a great number of highly interesting subjects, as, commercial partnerships ; insurance ; patents for inventions ; property in literature and works of art ; regulations of manufactures ; jurisdiction of *prudhommes* ; expropriation for the benefit of the public ; mines ; inconvenient and unhealthy trades ; patents ; exchanges and chambers of commerce, &c. The ability manifested by Mr. Wolowski, in conducting his review, affords a sure guaranty of success in his new duties of professor. He will continue notwithstanding this appointment to have charge of the Review of Legislation and Jurisprudence. The present number of that work, among other interesting articles, contains notices of Thibaut's tract on the historical and philosophical schools of law in Germany, and of Mr. Beaussant's maritime code relating to merchant vessels, an article on competition and monopoly, by Mr. Wolowski, and one on the immediate establishment of a national bank of circulation by a simple ministerial decree, by Mr. Lavergne.

## QUARTERLY LIST OF NEW PUBLICATIONS.

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### FRANCE.

Discussion préliminaire du projet de loi sur les brevets d'invention, de perfectionnement et d'importation [*Preliminary discussion of a proposed law concerning patents, &c.*] ; par une réunion d'industriels inventeurs, présidée par M. Théodore Regnault. Paris, Regnault.

Des lettres de change et des effets du commerce en général [*On bills of exchange and commercial paper in general*] ; par M. Louis Nouguiér. 2 vols. Paris, Hingray.

Nouveau Code du propriétaire et du commerçant [*Proprietors' and merchants' new code*] ; par une société des jurisconsultes. 2e ed. Paris, Cormon et Blanc.

Code maritime, ou lois de la marine marchande, [*Maritime code, or laws relating to merchant vessels*] réunies, coordonnées et expliquées ; par M. Beaussant. Paris, Legrand.

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[This collection makes four large octavo volumes. The first is the first volume of the original work ; the second and third contain the notes of Messrs. Cowen & Hill ; and the fourth is the second volume of Mr. Phillips's work, with notes by "a counsellor at law," whose name does not appear. We do not doubt the ability or learning of the editors ; nor do we question the real value of their annotations ; but we certainly cannot commend the manner in which their editorial labors have been brought before the public ; the whole thing is got up and executed in quite a slovenly way.]

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*By C. C. Little and James Brown, Boston.*

A Treatise on the Law of Insurance. By *W. Phillips*. 2d ed.

A Treatise on the Rights and Duties of Merchant Seaman, according to the British, the American, and the Foreign Law ; with a supplementary chapter on the Interest and Distribution of Prize, &c. By *George T. Curtis*.

[We have been allowed to peruse a portion of the manuscript of this work. It promises to be a work of value and usefulness to practical navigators as well as professional men, since it contains rules and directions, by which masters of vessels may act in the various emergencies which occur, especially in foreign ports, and thus be enabled to avoid the serious mistakes into which they sometimes fall from ignorance of their own duties, and the rights of their seamen.]

Digest of the Massachusetts and Pickering's Reports. By *J. C. Perkins* and *J. H. Ward*.

*By Hilliard, Gray & Co., Boston.*

A Digest of the Decisions of the American Courts of Law and Admiralty. By *Theron Metcalf* and *J. C. Perkins*.

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## TO OUR READERS.

We have been obliged, for want of room, to omit our usual head of *INTELLIGENCE AND MISCELLANY*, in the present number ; and, consequently, among other things, to defer the publication of an extract from Mr. Curtis's forthcoming work on merchant seamen, with which we have been favored by the author.

Our next number will contain articles on the law of contracts (continued),—on the rights of the slave-holding states and of the owners of slave property under the constitution of the United States (which we regret was not received in season for the present number),—on the effect of drunkenness as a ground of relief from criminal responsibility (translated from the German),—on international private law (continued),—on digests of American reports, and on American law periodicals,—to which we hope to be able to add, an article on the law of evidence, in continuation of the series under that title, and a review of the second part of Lieber's Political Ethics.















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